(25,271)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 469.

THE VALLEY STEAMSHIP COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN J. WATTAWA.

IN ERROR TO THE COURT OF APPEALS, EIGHTH DISTRICT, STATE OF OHIO.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 15, 1916.

Dec. 6th, 1913. Answer filed.
Dec. 17th, 1913. Motion by Pl'ff to strike from answer with notice and brief filed.

Jan. Term, 1914.

Jan. 12th, 1914. To Court. The motion by the plaintiff to strike certain matters from the defendant's answer is heard and granted, to which the defendant excepts.

Jour. 194, Pg. 52.

Mar. 19th, 1914. Amended Answer filed.
Mar. 20th, 1914. Reply by pl'ff filed.
Mar. 24th, 1914. To Court. The parties by their attorneys come and a jury is duly empaneled and sworn, who after due trial "do find for the plaintiff" and assess his damages at Fifty Two Hundred Dollars ($5200.00).

Jour. 194, Pg. 768.

Mar. 25th, 1914. Motion by Def't for a new trial filed.

Apr. Term, 1914.

Apr. 11th, 1914. To Court. The motion by the defendant for a new trial of this case, is heard and overruled, to which the defendant excepts. It is therefore considered that said plaintiff recover of said defendant his said damages and also his costs of this suit. Judgment is rendered against the defendant for the costs herein.
3 & 4

Jour. 195, Pg. 53.

May 12th, 1914. Bill of Exceptions by Def't filed and notice issued.
May 14th, 1914. Notice of Bill ret'd endorsed on the 13th day of May, 1914, I served this notice on the within named John J. Wattawa by delivering a true and certified copy thereof, to C. S. Reed, of the firm of Reed, Eichelberger and Nord, Att'ys of record for said John J. Wattawa. Sheriff Smith Fees, 91.
May 25th, 1914. Bill of Exceptions transmitted to trial judge.
May 27th, 1914. Bill of Exceptions received from trial judge.
June 15th, 1914. Petition in error filed in Court of Appeals by Def't.

THE STATE OF OHIO,
Cuyahoga County, ss:

I, Edmund B. Haserodt, Clerk of the Court of Common Pleas, in and for said County, do hereby certify that the above is a true transcript of the Docket and Journal Entries of said Court, in the above entitled cause.

And I also certify that the enclosed are the original papers and pleadings, filed in said cause, in the said Court of Common Pleas.

Attest, my hand and the Seal of said Court, at Cleveland, this 15th day of June, 1914.

[Seal Common Pleas Court, Cuyahoga County, Ohio.]

EDMUND B. HASERODT, *Clerk*,
By H. A. GALE, *Deputy Clerk*.

Filed Jan. 21, 1915. Supreme Court of Ohio. Frank E. McKean, clerk.

5 [Endorsed:] Court of Appeals, No. 597; Common Pleas, No. 136,647. Cuyahoga County. John J. Wattawa vs. The Valley Steamship Company, a Corp. Certificate of Docket and Journal Entries. Filed in the Court of Appeals —— —, 191-. —— ——, Plaintiff's Attorney; —— ——, Defendant's Attorney.

6 Filed Jan. 21, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

In the Court of Common Pleas of Cuyahoga County, Ohio.

JOHN J. WATTAWA, Manitowoc, Wis., Plaintiff,
vs.
THE VALLEY STEAMSHIP COMPANY, a Corporation, Western Reserve Bldg., City, Defendant.

Petition.

The Plaintiff, for his cause of action, says:

That the Defendant, The Valley Steamship Company, is a corporation, organized and existing under and by virtue of the laws of the State of Ohio, maintaining its general office and place of business in the City of Cleveland, Cuyahoga County, Ohio.

That said company is engaged in carrying bulk freight upon the Great Lakes and their connecting and tributary waters, and it the pursuit of such business it owns and operates a large fleet of steam vessels, among which was the steamer "Edwin N. Ohl;" which said steamer was owned and operated by the defendant and manned by its officers and agents. That the said steamer "Edwin N. Ohl" was a large vessel of about seventy-five hundred tons carrying capacity, and over five hundred feet in length, and had upon the decks thereof twenty-three hatches, extending across almost the entire width of the

boat, and said hatches were nine feet in width and were situated close together along the deck of the said vessel, and were covered by collapsable steel hatch covers, which were opened and closed by means of machinery upon the deck of the said vessel.

7 That in the operation of the said steamer the defendant company had regularly employed more than five workmen or operatives and the defendant was not, at the times hereinafter mentioned, a subscriber or contributor to the State Insurance Fund of the State of Ohio, as provided by the Workmen's Compensation Law of the State of Ohio for the protection of employees.

The plaintiff says that on or about the 2nd day of September, 1913, and for a few days prior thereto, the plaintiff was, and had been, in the employ of the defendant working as a deck hand upon the said steamer "Edwin N. Ohl," for the defendant company, and that on the said 2nd day of September, 1913, the said steamer was tied to the dock in the harbor at Sandusky, Ohio, where it had been moored for several days for the purpose of being loaded with coal from the said dock.

That the plaintiff had worked in and upon said steamer as a deck hand for but a few days, and had had but a few days' prior acquaintance with, and experience in and about steamers. That he was then twenty-three years of age, and had had but a few days' previous experience as a deck hand; all of which the defendant well knew, or in the exercise of due care could have known.

Plaintiff further says that about 10:00 o'clock in the evening of the said 2nd day of September, 1913, the plaintiff went aft along the deck of the said steamer to the quarters provided for deck hands, and in passing along the deck walked over the hatches of the said steamer, which were covered, for some distance, when suddenly and unexpectedly, when stepping from one hatch cover to the place where the next hatch cover should have been, without fault on his part, he stepped into the open hatch in said vessel, which had been negligently left uncovered by the defendant company, and the plain-

8 tiff fell to the bottom of said boat through the said open hatchway and his left leg was broken and fractured in two places above the knee and in one place below the knee, and the bones of his said leg were so shattered that in uniting they are out of alignment, and his left leg is weakened and stiffened and is permanently injured; and his left arm was broken near the wrist and the bones of the said arm were splintered and injured so that the movement of the left arm is limited and the use thereof is permanently impaired, all to his permanent injury; and the plaintiff's lower jaw bone was fractured, and he has not full use of his jaw, and he has suffered great pain and injury therefrom; and the drums of his ears were ruptured, causing intense pain and bleeding and partial loss of hearing.

Plaintiff says that at the time he was walking along said deck he believed the fact to be that all the hatches on said steamer were closed; that the said open hatch in which he stepped was not guarded or protected by lights, or by warning of any character and that the lights in the hold of the said steamer which should have been burn-

ing when the hatches on said steamer were open, were not burning, but were out. Plaintiff further says that the deck of said steamer was dark, and there were no lights of any kind on the deck by which he could see that the said hatch was open, uncovered and unguarded.

Plaintiff further says that he had received no warning or instructions from the defendant company or its officers and agents that said hatch was open and unguarded, and that he did not know, nor could he in the exercise of ordinary care on his part have known that said hatch was open. Plaintiff further says that at the time he received the injuries aforesaid the said steamer was not engaged in taking on a cargo of coal, but was lying waiting until such time as it
9 could begin loading, and that there was not then any occasion for such hatch being open or uncovered.

Plaintiff says that the aforesaid injuries were caused to him directly and proximately by the negligence of the defendant in the following particulars, to-wit:

I.

In that the defendant carelessly and negligently opened and uncovered the said hatch while the said steamer was lying moored at the dock and was not engaged in receiving any cargo through the said hatch.

II.

The defendant carelessly and negligently failed to close the said hatch at the approach of darkness so that those employed in and about said steamer would not walk into said open hatch in the darkness.

III.

The defendant carelessly and negligently failed to place near and about said open hatchway any lights to warn those upon the deck of the said steamer of the fact that the said hatch was open.

IV.

The defendant carelessly and negligently failed to guard said open hatchway and to protect the same in any way to prevent those upon the deck of said steamer from falling therein.

V.

The said defendant was negligent and careless in failing to keep the lights in the hold of said steamer brurning while the said hatch was open and uncovered.

10 VI.

The defendant was negligent and careless in not warning and instructing the plaintiff of the fact that the said hatch was open and

uncovered, and not warning and instructing the plaintiff on the danger incident to the said hatch being open, unguarded and not illuminated.

VII.

The defendant was negligent and careless in that it did then and there maintain a defective and unsafe condition in its ways and works, in that the defendant had negligently failed to guard and protect the said open hatch-way, and that it had failed to place any lights or means of warning about the same, or to maintain any lights in the hold of said steamer, and the deck of said steamer was in an unsafe and defective condition, in that the said deck was not illuminated in order that those on and about the deck of said steamer would know that the said hatchway was open.

Plaintiff says that at the time he fell in said open hatch-way he did not see that the said hatch-way was open, unguarded and protected, and that he could not have discovered the same by the exercise of due care upon his part, and that he was at the time he fell in the said hatch-way rightfully upon the deck of said steamer in pursuance of his employment, and was in the exercise of due care for his own safety at the time he received the aforesaid injuries.

Plaintiff says that as a result of the injuries set forth above he has been caused great pain and suffering and mental and physical anguish; he has been put to large expense for medical care and treatment, and will continue to suffer pain; that he has suffered loss of wages and his earning capacity is permanently destroyed; that he has been deformed and is disfigured permanently, and by
11 reason of his injuries he has suffered damage in the sum of Twenty Thousand ($20,000.00) Dollars.

Wherefore, the plaintiff asks judgment against the defendant in the sum of Twenty Thousand — (($20,000.00) and his costs herein.

REED & EICHELBERGER AND
H. J. NORD,
Attorneys for Plaintiff.

12 STATE OF OHIO,
Cuyahoga County, ss:

John Wattawa, being first duly sworn, says that he is plaintiff in the above entitled action; that he knows the contents of the foregoing petition and the allegations therein contained are true as he verily believes.

JOHN J. WATTAWA.

Sworn to before me, and subscribed in my presence, this 28 day of October, 1913.

[Notarial Seal, Cuyahoga County.]

JOHN F. TICHY,
Notary Public.

Tax fees, 40c.

13 In the Court of Common Pleas of Cuyahoga County, Ohio.

Precipe

JOHN J. WATTAWA, Plaintiff,
vs.
THE VALLEY STEAMSHIP CO., Defendant.

To the Clerk:

Please issue summons for the defendant in the above entitled action, directed to the Sheriff of Cuyahoga County, Ohio, returnable according to law. Endorse thereon: "Action for money only; amount claimed Twenty Thousand ($20,000.00) Dollars."

REED & EICHELBERGER AND
H. J. NORD,
Attorneys for Plaintiff.

14 [Endorsed:] 136,647. In the Court of Common Pleas of Cuyahoga County, Ohio. John J. Wattawa vs. The Valley Steamship Co. Petition. Holding, Masten, Duncan & Leckie. Rockefeller Bldg. 11-17-'13, 2¹/—. Recorded, Vol. 986, Page 50. Reed & Eichelberger, Attorneys for Plaintiff. 11/5/13. Dep. $10.00. J. A. R. Filed, and summons issued Nov. 5, 1913. Edmund B. Haserodt, Clerk. Filed Court of Appeals Jun- 15, 1914. Cuyahoga County, Ohio. Edmund B. Haserodt, Clerk. Filed Jan. 21, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

15 Filed Jan. 21, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

Summons in Action for Money Only.

Revised Statutes, 5035 to 5047, Inclusive.

THE STATE OF OHIO,
Cuyahoga County, ss:

To the Sheriff of Cuyahoga County:

You are commanded to notify The Valley Steamship Company, a Corp., Western Reserve Bldg., that it has been sued by John J. Wattawa in the Court of Common Pleas of Cuyahoga County and that unless it answer by the 6 day of Dec., A. D. 1913, the petition of the said plaintiff against it filed in the Clerk's office of said Court such petition will be taken as true, and judgment rendered accordingly.

You will make due return of this summons on the 17 day of Nov. A. D. 1913.

Witness, Edmund B. Haserodt, Clerk of said Court, and the seal thereof, at the City of Cleveland, this 5 day of Nov. A. D. 1913.

[Seal Common Pleas Court of the County of Cuyahoga, Ohio.]

EDMUND B. HASERODT, *Clerk,*
By H. L. NICHOLAS, *Deputy Clerk.*

Returnable 2d Monday after issue. Answer by 3d Saturday after return day. [Issued to other County, Sec. 5639. Injunc, Secs. 5577 and 5578.]

16 [Endorsed:] Recorded, Vol. 986, Page 50. No. 136,647. Cuyahoga Common Pleas. John J. Wattawa vs. The Valley Steamship Co. Summons in action for the recovery of money only. Amount Claimed, $20,000.00 for which with interest from the — day of ——, 191-, judgment will be taken if you fail to answer. Returnable Nov. 17, 1913. Reed & Eichelberger, Plaintiff's Attorney-. Received Nov. 5, 1913. W. J. Smith, Sheriff. Returned and filed Nov. 13, 1913. 11/7. Fee taxed. Filed Court of Appeals, Jun- 15, 1914. Cuyahoga County, Ohio. Edmund B. Haserodt, Clerk.

THE STATE OF OHIO,
Cuyahoga County, ss:

On the 12th day of November, 1913, I served this writ on the within named, The Valley Steamship Company, a corporation, by delivering a true and certified copy thereof with all the endorsements thereon to Charles Williams, Sec'y of said corporation, the president or other officer not found in my county.

W. J. SMITH, *Sheriff,*
By G. H. STEYHANGER, *Deputy.*

Sheriff's fees:

Service and Return.....	75
Copy	..
Mileage	16
	91

17 Filed Jan. 21, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

In the Court of Common Pleas of Cuyahoga County, Ohio.

No. 136,647.

JOHN J. WATTAWA, Manitowoc, Wisconsin, Plaintiff,
vs.
THE VALLEY STEAMSHIP COMPANY, a Corporation, Western Reserve Building, City, Defendant.

Answer.

Defendant for answer to the petition herein filed admits it is and was at all times mentioned therein, a corporation of Ohio, and says it was at all of said times engaged in interstate commerce, and was at the time said injuries are alleged to have been received.

It admits it was and is owner of the steamer Edwin N. Ohl, and says that she is a modern vessel, fitted with hatches in the usual manner, and was operated by defendant, through its officers and agents.

It admits that in the operation of said steamer it employed more than five men, and that it was not at the time mentioned a subscriber or contributor to the State Insurance Fund of Ohio.

Defendant admits that on Sepember 2, 1913, and for some time prior thereto, plaintiff, who it says was and is a non-resident of Ohio, was and had been in the employ of said steamer, which was at the time of the alleged injuries moored in Sandusky Harbor, waiting to take on a cargo of coal to be carried to the port of Superior in the State of Wisconsin.

Defendant says that the hatch cover of the hatch into which plaintiff fell was removed for the purpose of being in readiness to take on cargo; that it was and had been for many years a uniform and universal custom to so remove hatch covers for such purpose, and
18 that said custom was well known and universally acquiesced in by those engaged in navigating and operating vessels upon the Great Lakes and tributary waters.

Defendant further says that plaintiff assisted in removing said hatch cover, and knew it was off, and assumed the risk of walking upon the deck of said vessel with said hatch cover off. That at the time plaintiff approached said hatch there were lights in the hold at said hatch, upon the deck and upon the dock nearby, and that said lights were sufficient to have enabled plaintiff and anybody upon the deck of said vessel to see that said hatch cover was off, and plaintiff knew, or in the exercise of ordinary care could have seen said hatch cover was off before he reached said hatch, and that he was guilty of negligence directly and proximately causing any injuries he received in attempting to cross said hatch with the cover removed under said circumstances.

Defendant says that plaintiff knew of the danger of stepping into an open hatch, and that it was not its duty to warn or instruct plaintiff of or concerning said danger, or to give him any warning, except by light at the hatch, that the hatch cover he had assisted in removing was off; but, on the contrary, it was plaintiff's duty to ascertain whether the same remained off after he and others had removed the same.

Defendant admits that plaintiff fell into said hatch and that he was injured, but denies he was injured in the manner or as severely as alleged, and says any injuries he receivevd were due wholly and solely to his own negligence.

Defendant denies each and every allegation in said petition contained not hereinbefore admitted to be true.

Defendant further says if it be found negligent in any respect as alleged in said petition, that plaintiff assumed the risk of walking upon said deck in the condition as to lights and hatches as they then were; and that he was guilty of contributory negligence
19 in failing to see that said hatch cover was off before he undertook to cross said hatch.

Wherefore defendant prays that the petition be dismissed.

HOLDING, MASTEN, DUNCAN & LECKIE,
Attorneys for Defendant.

STATE OF OHIO,
Cuyahoga County, ss:

Charles A. Williams being first duly sworn, deposes and says he is the Secretary of The Valley Steamship Company, defendant herein; that he has read the foregoing answer and that the allegations thereof are true, as he verily believes.

CHARLES A. WILLIAMS.

Subscribed in my presence and sworn to before me this 5th day of December, 1913.

[Notarial Seal, Cuyahoga County, Ohio.]

ARTHUR W. GOLDSMITH,
Notary Public.

20 [Endorsed:] Cuyahoga Common Pleas Court. No. 136,-647. John J. Wattawa, Plaintiff, vs. The Valley Steamship Co., Defendant. Reed & Eichelberger, 1520 Rockefeller, 12/8/13. H. J. Nord, 383 Arcade. 12/8/13. Answer. Fee Taxed. Holding, Masten, Duncan & Leckie, 840-848 Rockefeller Building, Cleveland, Ohio, Attorneys for Defendant. Filed Dec. 6, 1913. Edmund B. Haserodt, Clerk. Filed. Court of Appeals, Jun- 15, 1914. Cuyahoga County, Ohio. Edmund B. Haserodt, Clerk. Filed Jan. 21, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk. Recorded, Vol. 986, Page 50.

21 Filed Jan. 21, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

In the Court of Common Pleas of Cuyahoga County, Ohio.

No. 136,647.

JOHN J. WATTAWA, Manitowac, Wisconsin, Plaintiff,
vs.
THE VALLEY STEAMSHIP COMPANY, a Corporation, Western Reserve Building, Cleveland, Ohio, Defendant.

Notice of Motion.

Messrs. Holding, Masten, Duncan & Leckie, Rockefeller Building, Cleveland, Ohio, Attorneys for Defendant:

Please take notice that the plaintiff has filed his application to strike certain allegations from the answer; said motion to be for hearing on December 20th or as soon thereafter as the court will hear the same.

REED & EICHELBERGER,
Attorneys for Plaintiff.

Notice of said motion by copy acknowledged this 16th day of December, 1913.

HOLDING, MASTEN, DUNCAN & LECKIE,
Attorneys for Defendant.

22 In the Court of Common Pleas of Cuyahoga County, Ohio.

No. 136,647.

JOHN J. WATTAWA, Manitowac, Wisconsin, Plaintiff,
vs.
THE VALLEY STEAMSHIP COMPANY, a Corporation, Western Reserve Building, Cleveland, Ohio, Defendant.

Motion to Strike from the Answer.

Now comes the plaintiff, through his attorneys Reed & Eichelberger, and moves to strike on the answer herein filed the following:

First. On the second page of said answer and in the sixth paragraph thereof the following language: "And assume the risk of walking upon the deck of said vessel with said hatch cover off."

Second. The entire final *a*pragraph of the said answer, the same being as follows: "Defendant further says that if it be found negligent in any respect as alleged in the petition, then plaintiff assumed the risk of walking upon said deck and the condition as to lights

and hatches as they then were; and that he was guilty of contributary negligence in failing to see that said hatch cover was off before he undertook to cross said hatch."

REED & EICHELBERGER,
Attorneys for Plaintiff.

Brief.

The petition alleges that the defendant had not complied with the Workmens' Compensation Act in that it failed to pay any premiums into the State Insurance Fund and thereby give its employees the benefit of a compensation provided for by statute. This fact, together with the fact that it employed more than five workmen, it admitted in the answer.

Under this state of facts the statute expressly deprives the defendant of the right to offer as a defense the assumption of risk by the plaintiff or his contributary negligence.

Not being allowed to offer this defense, it is improper to plead the same as an answer. The sole question to determine in
23 this case is whether the defendant was negligent in any of the respects mentioned in the petition. See Workmen's Compensation Act; State of Ohio 102 Ohio Laws; also 103 Ohio Laws page 82 Section 26.

REED & EICHELBERGER,
Attorneys for Plaintiff.

24 [Endorsed:] In the Court of Common Pleas of Cuyahoga County, Ohio. 136,647. John J Wattawa, Plaintiff, vs. The Valley Steamship Co., a corporation, Defendant. Motion to Strike from the Answer. 65780. Fee Taxed. Reed & Eichelberger, Att'ys for Pl't'f. Filed Dec. 17, 1913. Edmund B. Haserodt, Clerk. Filed. Court of Appeals. Jun- 15, 1914. Cuyahoga County, Ohio. Edmund B. Haserodt, Clerk. Filed Jan. 21, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk. Recorded, Vol. 986, Page 50.

25 Filed Jan. 21, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

In the Court of Common Pleas of Cuyahoga County, Ohio.

No. 136,647.

JOHN J. WATTAMA, Manitowoc, Wisconsin, Plaintiff,
vs.
THE VALLEY STEAMSHIP COMPANY, a Corporation, Western Reserve Building, City, Defendant.

Amended Answer.

Defendant for amended answer to the petition herein filed admits it is and was at all times mentioned therein, a corporation of

Ohio, and says it was at all of said times engaged in interstate commerce, and was at the time injuries to plaintiff are alleged to have been received.

It admits it was and is owner of the steamer Edwin N. Ohl, and says that she was at the time alleged in the petition, a modern vessel, fitted with hatches in the usual manner, and says she was operated by defendant, through its officers and agents, as authorized and directed by the laws of the United States.

Defendant says that when said steamer was being operated it employed more than five men, but that said steamer was not operated at any time to exceed seven months in the year, and that it was not required by the statutes of Ohio to become a subscriber or contributor to the state insurance fund of Ohio.

Defendant admits that on September 2, 1913, and for some time prior thereto, plaintiff, who it says was and is a non-resident of Ohio, was and had been in the employ of said steamer, which was at the time of the alleged injuries moored in Sandusky Harbor, waiting to take on a cargo of coal to be carried to the port of Superior in the State of Wisconsin.

Defendant says that the hatch cover of the hatch into which plaintiff fell was removed for the purpose of being in readiness to take on cargo; that it was and had been for many years a uniform and universal custom to so remove hatch covers for such purpose,
26 and that said custom was well known and universally acquiesced in by those engaged in navigating and operating vessels upon the Great Lakes and tributary waters.

Defendant further says that plaintiff assisted in removing said hatch cover, and knew it was off, (and assumed the risk of walking upon the deck of said vessel with said hatch cover off.) That at the time plaintiff approached said hatch there were lights in the hold at said hatch, upon the deck and upon the dock nearby, and that said lights were sufficient to have enabled plaintiff and anybody upon the deck of said vessel to see that said hatch cover was off, and plaintiff knew, or in the exercise of ordinary care could have seen said hatch cover was off before he reached said hatch, and that he was guilty of negligence directly and proximately causing any injuries he received in attempting to cross said hatch with the cover removed under said circumstances.

Defendant says that plaintiff knew of the danger of stepping into an open hatch, and that it was not its duty to warn or instruct plaintiff of or concerning said danger, or to give him any warning, except by the hatch light, that the hatch cover he had assisted in removing was off; but, on the contrary, it was plaintiff's duty to ascertain whether the same remained off after he and others had removed the same.

Defendant admits that plaintiff fell into said hatch and that he was injured, but denies he was injured in the manner or as severely as alleged, and says any injuries he received were due wholly and solely to his own negligence.

Defendant denies each and every allegation in said petition contained not hereinbefore admitted to be true.

(Defendant further says that if it be found negligent in any respect as alleged in said petition, that plaintiff assumed the risk of walking upon said deck in the condition as to lights and hatches as they then were; and that he was guilty of contributory negligence in failing to see that said hatch cover was off before he undertood to *to* cross said hatch.)

27 Wherefore defendant prays that the petition be dismissed.

HOLDING, MASTEN, DUNCAN & LECKIE,

Attorneys for Defendant.

NOTE.—Words in parenthesis stricken out.

STATE OF OHIO,
Cuyahoga County, ss:

W. H. Becker, being first duly sworn, deposes and says he is the President of The Valley Steamship Company, defendant herein; that he has read the foregoing amended answer, and that the allegations thereof are true, as he verily believes.

W. H. BECKER.

Subscribed in my presence and sworn to before me this 19th day of March, 1914.

[Notarial Seal, Cuyahoga County, Ohio.]

ARTHUR M. GOLDSMITH,
Notary Public.

28 [Endorsed:] No. 136,647. In the Court of Common Pleas of Cuyahoga County, Ohio. John J. Wattama, Manitowoc, Wisconsin, Plaintiff, vs. The Valley Steamship Company, a corporation, Western Reserve Building, City, Defendant. Amended Answer. Holding, Masten, Duncan & Leckie, 1020 Rockefeller Building, Attorneys for Defendant. Filed Mar. 19, 1914. Edmund B. Haserodt, Clerk. Filed Court of Appeals, Jun- 15, 1914. Cuyahoga County, Ohio. Edmund B. Haserodt, Clerk. Filed Jan. 21, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk. Recorded Vol. 986, Page 50.

29 Filed Jan. 21, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

In the Court of Common Pleas of Cuyahoga County.

No. 136,647.

JOHN J. WATTAWA, Manitowoc, Wisconsin, Plaintiff,
vs.
THE VALLEY STEAMSHIP COMPANY, a Corporation, Western Reserve Building, City.

Reply.

Now comes the plaintiff in the above entitled action and for his reply to the amended answer filed by the defendant herein, he denies each, all and singular the allegations and averments in said answer contained which are not admissions of and not consistent with the allegations and averments contained in the plaintiff's petition.

REED, EICHELBERGER & NORD,
GEORGE W. RITTER.

STATE OF OHIO,
Cuyahoga County, ss:

John J. Wattama, being first duly sworn, says that he is the plaintiff in the above entitled action; that he has read the foregoing reply and that the statements therein contained are true as he verily believes.

JOHN J. WATTAMA.

Sworn to before me and subscribed in my presence this 18th day of March, 1914.

[Notarial seal, Cuyahoga County, Ohio.]

HERMAN J. NORD,
Notary Public.

30 [Endorsed:] In the Court of Common Pleas of Cuyahoga County, Ohio. No. 136,647. John J. Wattama, Plaintiff, vs. The Valley Steamship Company, a corporation, Defendant. Reply. Reed, Eichelberger & Nord, Rockefeller Building, Cleveland, Ohio. Filed Mar. 20, 1914. Edmund B. Haserodt, Clerk. Filed. Court of Appeals, Jun- 15, 1914. Cuyahoga County, Ohio. Edmund B. Haserodt, Clerk. Filed Jan. 21, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk. Recorded, Vol. 986, Page 50.

31 In the Court of Common Pleas of Cuyahoga County, Ohio.

No. 136,647.

JOHN J. WATTAWA, Plaintiff,
vs.
THE VALLEY STEAMSHIP COMPANY, a Corporation, Defendant.

Motion for New Trial.

Now comes defendant and moves the court to set aside the verdict rendered herein, and to grant defendant a new trial for the following reasons:

1. The verdict is contrary to the weight of the evidence.
2. The verdict is not sustained by sufficient evidence.
3. The verdict is contrary to law.
4. The court erred in admitting testimony introduced by plaintiff to which the defendant duly objected and excepted.
5. The court erred in rejecting evidence tendered by defendant to which defendant duly excepted.
6. The court erred in its charge to the jury.
7. The court erred in refusing to charge the jury as requested by defendant, to which refusal defendant duly excepted.

For other errors occurring at the trial to which exception was duly taken.

HOLDING, MASTEN, DUNCAN & LECKIE,
Attorneys for Defendant.

32 [Endorsed:] Cuyahoga Common Pleas Court. No. 136,647. John J. Wattawa, Plaintiff, vs. The Valley Steamship Company, a corporation, Defendant. Motion for New Trial. Holding, Masten, Duncan & Leckie, 1020 Rockefeller Building, Cleveland, Ohio, Attorneys for Defendant. Filed Mar. 25, 1914. Edmund B. Haserodt, Clerk. Filed. Court of Appeals, Jun- 15, 1914. Cuyahoga County, Ohio. Edmund B. Haserodt, Clerk. Filed. Jan. 21, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk. Recorded, Vol. 986, Page 50.

32½ Filed Jan. 21, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

32¾ STATE OF OHIO,
Cuyahoga County, ss:

In the Court of Common Pleas.

CLERK'S OFFICE, CLEVELAND, O., May 12, 1914.

No. 136,647.

JOHN J. WATTAWA,
vs.
THE VALLEY STEAMSHIP CO.

Notice of the Filing of Bill of Exceptions.

To Reed, Eichelberger & Nord, Att'ys for Pl'ff.:

In compliance with Section 5301 R. S. as amended, you are hereby notified that Def't filed a Bill of Exceptions in the above entitled case on this date.

EDMUND B. HASERODT, *Clerk,*
By H. L. NICHOLAS, *Deputy Clerk.*

32¾ [Endorsed:] No. 136,647. John J. Wattawa, vs. The Valley Steamship Co. Notice of the Filing of Bill of Exceptions. Filed. Court of Appeals, Jun- 15, 1914. Cuyahoga County, Ohio. Edmund B. Haserodt, Clerk. May 12, 1914. W. J. Smith Sheriff Cuyahoga County. May 14, 1914. Recorded, Vol. 986, Page 50.

STATE OF OHIO,
Cuyahoga County, ss:

On the 13th day of May, 1914, I served this notice on the within named John J. Wattawa, by delivering a true and certified copy thereof, to C. S. Reed, of the firm of Reed, Eichelberger and Hord, Att'ys of record for said John J Wattawa

W. J. SMITH, *Sheriff,*
By H. GREY KEMPER, *Deputy.*

Sheriff's Fees:

Service & Return	75
Copy	..
Mileage	16
	91

33 STATE OF OHIO,
City of Columbus:

Supreme Court of the State of Ohio, of the Term of January, A. D. 1915, To wit, Tuesday, April 20th.

THE VALLEY STEAMSHIP COMPANY,
vs.
JOSEPH MRAZ.

Motion by Defendant to Strike Amended Petition in Error from the Files and to Dismiss Cause No. 14810 on the General Docket.

It is ordered by the Court that this motion be, and the same hereby is, sustained; and that the amended petition in error in this cause be, and the same hereby is, dismissed.

It is further ordered that defendant in error recover of plaintiff in error his costs herein expended, taxed at $ —.

Cost Bill.

Docket Fee	$5.00	paid by Holding, Masten, D. & L.
Motion "	$2.00	" " " " " " "
" "	$2.00	" " Reed, Eichelberger & Nord.
Sheriff's Fees.....	$1.17	" " —— ——.

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the Records of said Court, to-wit: from Journal No. 27, Page 84.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 27th day of April A. D. 1915.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN, *Clerk,*
By SEBOT H. MILLER, *Deputy.*

33½ [Endorsed:] 624. 136,648. Supreme Court of the State of Ohio. No. 8722. The Valley Steamship Company vs. Joseph Mraz. Certified Copy of entry. 2-132. Filed Apr. 28, 1915. Edumund B. Haserodt, Clerk.

34 STATE OF OHIO,
City of Columbus:

Supreme Court of the State of Ohio, of the Term of January, A. D. 1915, To wit, Tuesday, April 20th.

THE VALLEY STEAMSHIP COMPANY
vs.
JOSEPH MRAZ.

Motion for an Order Directing the Court of Appeals of Cuyahoga County, to Certify Its Record.

It is ordered by the Court that this motion be, and the same hereby is, overruled.

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the Records of said Court, to-wit: from Journal No. 27, Page 84.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 27th day of April, A. D. 1915.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN, *Clerk.*
By SEBOT H. MILLER, *Deputy.*

34½ [Endorsed:] 624. 136,648. Supreme Court of the State of Ohio. No. 8718. The Valley Steamship Company vs. Joseph Mraz. Certified Copy of entry. 2-132. Filed Apr. 28, 1915. Edmund B. Haserodt, Clerk.

35 STATE OF OHIO,
City of Columbus:

Supreme Court of the State of Ohio, of the Term of January, A. D. 1915, To wit, Tuesday, April 20th.

THE VALLEY STEAMSHIP COMPANY
vs.
JOHN J. WATTAWA.

Motion for an Order Directing the Court of Appeals of Cuyahoga County, to Certify Its Record.

It is ordered by the Court that this motion be, and the same hereby is, overruled.

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the Records of said Court, to-wit: from Journal No. 27, Page 84.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 27th day of April, A. D. 1915.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN, *Clerk.*
By SEBOT H. MILLER, *Deputy.*

35½ [Endorsed:] 597. 136,647. Supreme Court of the State of Ohio. No. 8719. The Valley Steamship Co. vs. John J. Wattawa. Certified Copy of entry. 2-131. Filed Apr. 28, 1915. Edmund B. Haserodt, Clerk.

36 STATE OF OHIO,
City of Columbus:

Supreme Court of the State of Ohio, of the Term of January, A. D. 1915, To wit, Tuesday, April 20th.

THE VALLEY STEAMSHIP COMPANY
vs.
JOHN J. WATTAWA.

Motion by Defendant to Strike Amended Petition in Error from the Files and to Dismiss Cause No. 14809 *on the General Docket.*

It is ordered by the Court that this motion be, and the same hereby is, sustained; and that the amended petition in error in this cause be, and the same hereby is, dismissed.

It is further ordered that defendant in error recover of plaintiff in error his costs herein expended, taxed at $—.

Cost Bill.

Docket Fee	$5.00	paid by	Holding, Master, D. & L.
Motion "	$2.00	" "	" " " " "
Printed Record	$2.00	" "	Reed, Eichelberger & Nord.
Sheriff's Fees	$1.17	" "	

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the Records of said Court, to-wit: from Journal No. 27, Page 84.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 27th day of April, A. D. 1915.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN, *Clerk.*
By SEBOT H. MILLER, *Deputy.*

36½ [Endorsed:] 597. 136,647. Supreme Court of the State of Ohio. No. 8721. The Valley Steamship Co. vs. John J. Wattawa. Certified Copy of entry. 2-131. Filed Apr. 28, 1915. Edmund B. Haserodt, Clerk.

37 In the Court of Appeals of Cuyahoga County, Ohio.

VALLEY STEAMSHIP COMPANY, a Corporation, Plaintiff in Error,
vs.
JOHN J. WATTAWA, Manitowac, Wis., Defendant in Error.

Petition in Error.

Plaintiff in error says that at the January Term, 1914, of the Court of Common Pleas of Cuyahoga County, Ohio, defendant in error recovered a judgment by the consideration of said court against plaintiff in error, in an action then pending therein, wherein defendant in error was plaintiff and plaintiff in error was defendant, a transcript of Docket and Journal Entries and Bill of Exceptions are filed herewith and made part hereof.

Plaintiff says that there is error in said record and proceedings in this, to-wit:

1. The court erred in sustaining the motion made by plaintiff below to strike out of the answer filed in said cause by defendant, the following allegations, to which defendant below duly excepted:

"And assumed the risk of walking upon the deck of said vessel with said hatch cover off",

and in striking out the following:

"Defendant further says that if it be found negligent in any respect as alleged in said petition, that plaintiff assumed the risk of walking upon said deck in the condition as to lights and hatches as they then were, and that he was guilty of contributory negligence in failing to see that the hach cover was off before he undertook to cross said hatch."

2. The court erred in sustaining the motion made by plaintiff below to strike from the files the amended answer of defendant below, to which defendant below duly excepted.

Plaintiff says that there was error in granting said motions in this, to-wit: That at the time of the injuries complained of, defendant below was engaged in navigating the vessel, upon which plaintiff was employed, in interstate commerce, and in the navigation thereof was subject to the laws of the United States;

38 that plaintiff below was a seaman on said vessel under a maritime contract between him and defendant, entered into in the State of Wisconsin; that the respective duties and obligations of the parties under such contracts have for many years been defined, determined and fixed by the general maritime law of the United States; that the statute of Ohio known as the "Workmen's Compensation Act", approved March 14, 1913, interfere with, abridges and impairs the rights and enlarges the duties and obligations of defendant below

and increases its responsibilities, as defined, determined and fixed by the maritime laws of the United States, which by operation of law became and were incorporated into and became a part of said contract, contrary to Article II, Section 28 of the Constitution of Ohio, and Article I, Section 10 of the Constitution of the United States.

3. The court erred in the admission of testimony introduced by plaintiff below to which defendant below duly objected and excepted.

4. The court erred in rejecting testimony offered by defendant below, to which ruling defendant duly objected and excepted.

5. The court erred in its charge to the jury.

6. The court erred in refusing to charge the jury as requested.

7. The verdict is contrary to law.

8. The verdict is against the manifest weight of the evidence.

9. The verdict of the jury is not sustained by sufficient evidence.

10. The court erred in overruling the motion of defendant below for a new trial.

11. For other errors appearing in the record.

39 Wherefore plaintiff in error prays that said judgment may be reversed, and that it may be restored to all things it has lost by reason thereof.

HOLDING, MASTEN, DUNCAN & LECKIE,
Attorneys for Plaintiff in Error.

(Summons in Error omitted.)

40 In the Court of Appeals of Cuyahoga County, Ohio.

VALLEY STEAMSHIP COMPANY, a Corporation, Plaintiff in Error,
vs.
JOHN J. WATTAWA, Manitowac, Wis., Defendant in Error.

Entry of Appearance.

The issue and service of summons in error in the above entitled action is waived, and defendant in error enters his appearance herein.

REED, EICHELBERGER, & NORD,
Attorneys for Defendant in Error.

June 13th, 1914.

41 [Endorsed:] 597. No. 136,647. Cuyahoga County Court of Appeals. Valley Steamship Company, a corporation, Plaintiff in error, vs. John J. Wattawa, Manitowac, Wis., Defendant in error. Petition in Error. Holding, Masteen, Duncan & Leckie, 1020 Rockefeller Building, Cleveland, Ohio., Attorneys for plaintiff in error. Filed Jun- 15, 1914. Edmund B. Haserodt, Clerk. Filed Jan. 21, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

42 THE STATE OF OHIO,
Cuyahoga County, ss:

January Term, A. D. 1914, to wit Mar. 24, 1914.

Room 14.

No. 136,647.

JOHN J. WATTAWA, Plaintiff,
vs.
THE VALLEY STEAMSHIP COMPANY, &c., Defendant.

Civil Action.

Verdict.

The jury in this case, being duly empaneled and Sworn, upon the concurrence of the undersigned Jurors, being not less than three-fourths of the whole number thereof, do find for the Plaintiff and assess his damages at $5200.00.

J. F. PALMER, *Foreman.*
JOHN BEUNK.
CHAS. NEWLAND.
HAROLD CORDER.
JOHN DONAHUE.
FRANK HIGHLEY.
JACOB SHEEGE.
CHAS. REHM.
J. A. FLEWELLING.
ALEX. SWEET.
THEO. SALBERG.
EDWARD SHATTUCK.

43 [Endorsed:] No. 136,647. Common Pleas Court. John J. Wattawa vs. The Valley Steamship Company, &c. Verdict. Civil Action. Filed Mar. 24, 1914, Room 14. Verdict for Plaintiff $5200.00. Filed. Court of Appeals, Jun- 15, 1914. Cuyahoga County, Ohio. Edmund B. Haserodt, Clerk.

44 No. 136,647.

WATTAWA
vs.
VALLEY STEAMSHIP CO.

Room ——.

Mar. 19, 1914, Room 14.

—— Term, 191–.

Plaintiff's Witnesses.

		Days	Miles	Amount	Ctfd.
1		....	....	....	....
2		....	....	....	....
3		....	....	....	....
4		....	....	....	....
5		....	....	....	....
6		....	....	....	....
7		....	....	....	....
8		....	....	....	....
9	~~///~~ ////√ Sworn	....	....	....	....
10		....	....	....	....
11		....	....	....	....
12		....	....	....	....
13		....	....	....	....
14		....	....	....	....
15		....	....	....	....
16		....	....	....	....
17		....	....	....	....
18		....	....	....	....
19		....	....	....	....
20		....	....	....	....
21		....	....	....	....
22		....	....	....	....
23		....	....	....	....
	Total	....	....	....	....

Filed Jan. 21, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

45 No. 136,647.

Defendant's Witnesses.

		Days	Miles	Amount	Ctfd.
1		....	....	....	....
2		....	....	....	....
3		....	....	....	....
4		....	....	....	....
5		....	....	....	....
6		....	....	....	....
7		....	....	....	....
8		....	....	....	....
9	/XX/ /XX/ /√ Sworn	....	....	....	....
10		....	....	....	....
11		....	....	....	....
12		....	....	....	....
13		....	....	....	....
14		....	....	....	....
15		....	....	....	....
16		....	....	....	....
17		....	....	....	....
18		....	....	....	....
19		....	....	....	....
20		....	....	....	....
21		....	....	....	....
22		....	....	....	....
23		....	....	....	....
	Total	....	....	....	....

Filed Mar. 19, 1914, room 14, *191–*. James H. Murray, Deputy Clerk.

46 [Endorsed:] 136,647. Cuyahoga Common Pleas. John J. Wattawa vs. The Valley Steamship Co. Disposed of —— Term, 191–. App. Docket 270, Page —. Recorded, Vol. —, Page —. Verdict. R. Filed Jan. 21, 1915. Supreme Court of Ohio, Frank E. McKean, Clerk.

47 THE STATE OF OHIO,
Cuyahoga County, ss:

In the Court of Appeals, January Term, 1914, Begun and Held January 5th, 1914.

C. of A., No. 597; C. P., No. 136,647.

January Term, 1914.

VALLEY STEAMSHIP CO., a Corp.,
vs.
JOHN J. WATTAWA.

Error to Common Pleas.

June 15, Petition in Error, Waiver of Process, Transcript and original papers from Common Pleas filed.

Aug. 19, 1914. Brief by Pl'ff in error with two copies and proof of service filed.

Sept. 5, 1914. Brief by Def't in error with two copies and proof of service filed.

Dec. 24, 1914. To Court; This cause came on to be heard upon the pleadings, and the transcript of the record in the Court of Common Pleas, and was argued by counsel; and on consideration of all the assigned errors, the court being of the opinion that substantial justice has been done the party complaining, the judgment of the said Court of Common Pleas is affirmed, there being, however, in the opinion of the court, reasonable ground for this proceeding in error. It is therefore considered that said defendant in error recover of said plaintiff in error his costs herein. Ordered that a special mandate be sent to the Court of Common Pleas, to carry this judgment into execution. To all of which the plaintiff in error excepts.
Jour. 2, Pg. 46.

Jan. 20th, 1915. Precipe filed and transcript of Docket and Journal Entries to Supreme Court issued.

Jan'y 26, 1915. Undertaking by pl'ff in error to stay proceedings in Supreme Court in 10425.12 with Globe Indemnity Co. as surety filed.

April 28, 1915. To Court: And thereupon on this day there was duly filed in this court a certain certificate of
48 Journal Entry, in this cause, which is in the words and figures following, to wit; "State of Ohio, City of Columbus, Supreme Court of the State of Ohio, of the Term of January, A. D. 1915. To wit; Tuesday April 20th. The

Valley Steamship Company vs. John J. Wattawa. Motion by Defendant to strike amended petition in error from the files, and to dismiss cause No. 14809 on the General Docket. It is ordered by the court that this motion be, and the same hereby is sustained, and that the amended petition in error in this cause be, and the same hereby is dismissed. It is further ordered that defendant in error recover of plaintiff in error his costs herein expended, taxed at $ —. I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the records of this Court, to wit, from Journal No. 27 page 84. In witness whereof, I have hereunto subscribed my name and affixed the seal of said Supreme Court this 27th day of April, A. D. 1915. Frank E. McKean, Clerk. By Seba H. Miller, Deputy. (Seal)" Attest Edmund B. Haserodt, Clerk. By R. E. Mollenkopf, Deputy.

Jour. 2, Pg. 131.

April 28, 1915. To Court; And thereupon on this day there was duly filed in this court a certain certificate of Journal entry, in this cause, which is in the words and figures following, to wit; "State of Ohio, City of Columbus. #14810. Supreme Court of the State of Ohio, of the term of January, A. D. 1915. To wit; Tuesday, April 20th. The Valley Steamship Company vs. John J. Wattawa. 8719. Motion for an order directing the court of Appeal- of Cuyahoga County, to certify its record. It is ordered by the court that this motion be, and the same hereby is overruled. I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the Records of said Court, to wit; from Journal No. 27 page 84. In Witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 27th day of April, A. D. 1915. Frank E. McKean, Clerk. By Seba H. Miller, Deputy. (Seal)." Attest Edmund B. Haserodt, Clerk. By R. E. Mollenkopf, Deputy.

Jour. 2, Pg. 131.

49

March 20, 1916. Writ of Error from the Supreme Court of the United States filed.
March 20, 1916. Petition for Writ of Error filed.
March 20, 1916. Supersedeas Bond in the sum of $10425.12 with The Globe Indemnity Co. of New York as surety filed.
March 20, 1916. Assignment of Errors and Prayer for Reversal filed.
March 20, 1916. Citation filed.
March 20, 1916. Precipe for transcript of record to United States Court filed.
April 7, 1916. Supplementary precipe for transcript of record to United States Court filed.

50 *Certificate of Docket and Journal Entries.*

Revised Statutes, Section 6716.

STATE OF OHIO,
Cuyahoga County, ss:

In the Court of Appeals.

——— ———,
vs.
——— ———.

——— Term, 191-.

51 THE STATE OF OHIO,
Cuyahoga County, ss:

I, Edmund B. Haserodt, Clerk of the Court of Appeals in and for said county, do hereby certify that the above is a true transcript of the docket and journal entries of said court in the above entitled cause.

And I also certify that the enclosed are the original papers and pleadings filed in said cause, in said Court of Appeals.

Witness my hand and the seal of said Court, at Cleveland, this 14th day of April 1916.

[Seal Court of Appeals, Cuyahoga County, Ohio.]

EDMUND B. HASERODT, *Clerk,*
By H. A. GALE, *Deputy Clerk.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 4/14/16. H. A. G.]

[Endorsed:] Court of Appeals No. 597. Com. Pleas No. 136,647. Cuyahoga County. Valley Steamship Co., a Corp., vs. John J. Wattawa. Certificate of Journal Entries.

52 THE STATE OF OHIO,
Cuyahoga County, ss:

Court of Appeals.

#597.

THE VALLEY STEAMSHIP COMPANY, a Corp.,
vs.
JOHN J. WATTAWA.

I, Edmund B. Haserodt, Clerk of the Court of Appeals, of the Eighth District of the State of Ohio, within and for the County of Cuyahoga, and in whose custody the files, journals and records of said Court are required by the laws of the State of Ohio to be kept, hereby certify that the foregoing petition for Writ of error, assignment of errors and prayer, order allowing writ, writ of error, citation, and supersedeas bond, and præcipe and supplemental præcipe for transcript are the original papers filed in this court. I further certify that the copies attached hereto are true and correct copies of the papers and pleadings named in the præcipe and supplemental præcipe for transcript, viz: Petition in Court of Common Pleas, Answer in Court of Common Pleas, Motion in Court of Common Pleas to strike from the Answer and the brief, Amended Answer in the Court of Common Pleas, Reply in Court of Common Pleas, Motion for New Trial in Court of Common Pleas, Petition in Error Court of Appeals, Docket and Journal Entries in Court of Appeals, Docket and Journal Entries in Court of Common Pleas, Bill of Exceptions in Court of Common Pleas, Brief of Plaintiff in Error in Court of Appeals Commencing with page eight and ending on page fifty-four at the caption "Plaintiffs were not without experience. They had worked about hatches." and paragraph one of Rule VIII on briefs in the Court of Appeals. That the foregoing are true and correct copies of the opinion in the Court of Appeals and of the Docket and Journal Entries in the Court of Appeals in said Cause.

In testimony whereof I do hereby subscribe my name officially, and affix the Seal of said Court of Appeals, at the Court House in the City of Cleveland, in the said County, this — day of April, A. D. 1916.

[Seal Court of Appeals, Cuyahoga County, Ohio.]

EDMUND B. HASERODT,
Clerk of Court of Appeals.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 4/14/16. H. A. G.]

53 In the Supreme Court of the United States.

THE VALLEY STEAMSHIP COMPANY, Plaintiff in Error,
vs.
JOHN J. WATTAWA, Defendant in Error.

Petition for Writ of Error.

To the Honorable Edward D. White, Chief Justice, and to the Associate Justices of the Supreme Court of the United States:

The petition of The Valley Steamship Company, a corporation of the State of Ohio, respectfully represents as follows:

I. Defendant in error heretofore on April 11, 1914, recovered a judgment against petitioner for the sum of Fifty-two Hundred Dollars ($5200.00) and the costs of the action, in the Common Pleas Court of Cuyahoga County, Ohio; said action being brought to recover damages for personal injuries sustained by defendant in error by reason of the alleged negligence of petitioner, while engaged as a seaman on a steamer of petitioner, which at the time was upon a navigable water of the United States within the State of Ohio, petitioner and its said steamer being then and at all previous times engaged exclusively in interstate commerce upon the Great Lakes and their tributary and connecting waters, and having employed defendant in error as such seaman in the State of Wisconsin.

II. The said Common Pleas Court held in said action and by rendering judgment as aforesaid, that the Act of May 31, 1911 of the Ohio Legislature, then constituting Sections 1465-37 to 1465-79 of the General Code of Ohio, and known as the Ohio Workmen's Compensation Act, should be construed as applying to petitioner, although engaged in interstate commerce as aforesaid, and to the employment of defendant in error with petitioner, although it was maritime in its nature, and the contract therefor had been made in the State of Wisconsin, and that said Workmen's Com-

54 pensation Act when so construed was valid and not in violation of the Constitution of the United States; and the said Common Pleas Court, both by refusing to permit petitioner to plead the defenses of assumption of risk, the fellow servant rule and contributory negligence, and by its charge to the jury, denied and refused to permit petitioner to make said defenses, for the reason that petitioner had not paid premiums into the State Insurance Fund of Ohio to provide for the payment of compensation to its employes receiving injuries in the course of their employment, as provided in said Compensation Act, and that the said Compensation Act and particularly Section 21-1 thereof, abolished said defenses as to any employer not complying with the Compensation Act and paying premiums into the said State Insurance Fund.

III. Petitioner thereafter filed petition in error in the Court of Appeals of Ohio for the Eighth District, to reverse said judgment of the Common Pleas Court, and therein alleged that the aforesaid

action and judgment of the Common Pleas Court were contrary to the Constitution of the United States as follows:

"Plaintiff says that there was error in granting said motions in this, to-wit: That at the time of the injuries complained of, defendant below was engaged in navigating the vessel, upon which plaintiff was employed, in interstate commerce, and in the navigation thereof was subject to the laws of the United States; that plaintiff below was a seaman on said vessel under a maritime contract between him and defendant, entered into in the State of Wisconsin; that the respective duties and obligations of the parties under such contracts have for many years been defined, determined and fixed by the general maritime law of the United States; that the statute of Ohio known as the 'Workmen's Compensation Act,' approved March 14, 1913, interferes with, abridges and impairs the rights and enlarges the duties and obligations of defendant below and increases its responsibilities, as defined, determined and fixed by the maritime laws of the United States, which by operation of law became and were incorporated into and became a part of said contract."

IV. The said judgment of the Common Pleas Court was, on December 24, 1914, affirmed by the said Court of Appeals, the opinion of said Court being as follows:

"It has many times been decided by the Supreme Court of this state, by the federal courts and by this court that a state statute regulating the relative rights and duties of persons within the state, and providing for their safety, will be enforced by both the
55 state and federal courts, in cases of which they have jurisdiction. Such state statutes, though they affect persons engaged in interstate commerce, are inapplicable only when they conflict with federal statutes upon the same subject.

Railway Co. v. State, 82 O. S., 60;
Trauffler v. D. & C. Navigation Co., 181 Fed., 256;
Erie Railroad Co. v. State of Ohio, #10 Court of Appeals of Cuyahoga County, decided Feb. 17, 1913.

The trial court, therefore, very properly gave in charge to the jury the rules provided by the Workmen's Compensation Act of this state, as applicable to the facts before it. This is true as to both cases here under review, which grew out of the same accident.

In neither record do we find any error prejudicial to the rights of plaintiff.

In each case the judgment is affirmed."

V. By virtue of Article IV, Section 2 of the Constitution of the State of Ohio and the statutes enacted in pursuance thereof, the Supreme Court of Ohio has appellate jurisdiction in all cases involving questions arising under the Constitution of the United States, and any judgment of the Court of Appeals involving any such constitutional questions may be reversed, vacated or modified by the Supreme Court on petition in error which the plaintiff in error may file without leave of court and as a matter of right; and the said Article IV, Section 2 further provides that in cases of pub-

lic or great general interest, the said Supreme Court may direct any Court of Appeals to certify its record to the Supreme Court, and may review, and affirm, modify or reverse, the judgment of the Court of Appeals.

And petitioner accordingly filed its petition in error in the Supreme Court of Ohio to reverse said judgment of the Court of Appeals on the ground that the case involved questions arising under the Constitution of the United States, as herein set forth, and of the State of Ohio, and also filed in the Supreme Court of Ohio its motion alleging that the case was one of public and great general interest, as well as involving said constitutional questions, and praying that the Supreme Court should accordingly direct the Court of Appeals to certify its record to the Supreme Court for review.

56 VI. Petitioner alleges that defendant in error thereupon filed his motion in the Supreme Court of Ohio to strike from the files the petition in error filed in the Supreme Court as aforesaid, on the ground that the case involved no questions arising under the Constitution of the United States, and the said Supreme Court on April 20, 1915, sustained said motion and dismissed said petition in error; and the said Supreme Court on said date also overruled petitioner's motion to certify the record to the Supreme Court.

VII. Petitioner alleges that by reason of the foregoing facts the said judgment of the Court of Appeals was a final judgment in the highest court of the State of Ohio in which a decision in said suit and matter could be had, and that there was drawn into question in said suit the validity of the Workmen's Compensation Law, a statute of Ohio, on the ground of its being repugnant to the Constitution and laws of the United States in the particulars set forth in said petition in error filed in the Court of Appeals as aforesaid, and the decision of the said Court of Appeals was in favor of its validity; and that petitioner in asserting and claiming in said suit that its liability should be determined by the maritime law of the United States, without modification by said Ohio statute, claimed a right, privilege and immunity under the Constitution of the United States, and the decision of the said Court of Appeals was against the said right, privilege and immunity specially set up and claimed by petitioner as aforesaid; and that in rendering said judgment the said Court of Appeals of Ohio acted in violation of Article 3, Section 2, and Article 6, Clause 2, and Article 1, Section 8, Clause 3 of the Constitution of the United States, and committed manifest error, as more particularly set forth in the Assignment of Errors herewith filed, and to the great prejudice of petitioner.

Wherefore, your petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to the Court of Appeals of Ohio for the Eighth District, to the end that the

57 record in said action may be removed into the Supreme Court of the United States; that citation to defendant in error be granted and signed; that the bond herewith presented may be approved, and that the said bond and writ of error may operate as a supersedeas; and that the record may be reviewed and the errors complained of be corrected, and the said judgment of the Court of

Appeals of Ohio be reversed, and judgment be entered for plaintiff in error or the action remanded to the Common Pleas Court of Cuyahoga County, Ohio, for a new trial.

THE VALLEY STEAMSHIP COMPANY,
By FRANK S. MASTEN, *Its Attorney.*
HOLDING, MASTEN, DUNCAN & LECKIE,
Cleveland, Ohio, Counsel.

The writ of error as prayed for in the foregoing petition is hereby allowed, this 16th day of March, 1916, the writ of error to operate as a supersedeas, and the bond for that purpose is hereby fixed at the sum of $10,425.12.

Dated at Washington, D. C., this 16th day of March, 1916.

OLIVER WENDELL HOLMES,
Associate Justice of the Supreme Court of the United States.

58 [Endorsed:] In the Supreme Court of the United States. The Valley Steamship Company, Plaintiff in Error, vs. John J. Wattawa, Defendant in Error. Petition for Writ of Error. Filed Mar. 20, 1916. Edmond B. Hascerodt, Clerk. Holding, Masten, Duncan & Leckie, 1020 Rockefeller Building, Cleveland, Ohio, Attorneys for Plaintiff in Error.

59 In the Court of Appeals of Ohio for the Eighth District.

THE VALLEY STEAMSHIP COMPANY, Plaintiff in Error,
vs.
JOHN J. WATTAWA, Defendant in Error.

Assignment of Errors and Prayer for Reversal.

Now comes the said plaintiff in error and respectfully submits that in the record, proceedings, decision and final judgment of the Court of Appeals of the State of Ohio for the Eighth District in the above entitled error proceeding, there is manifest error in the following particulars:

First. The said Court of Appeals erred in affirming the judgment of the Common Pleas Court of Cuyahoga County, Ohio.

Second. Said Court erred in not reversing the judgment of said Common Pleas Court, and in not entering judgment for plaintiff in error or remanding the action to said Common Pleas Court for a new trial.

Third. Said Court erred in adjudging by its action aforesaid, that the liability of a corporation of Ohio owning and operating steamers upon the Great Lakes and their tributary and connecting waters to a seaman injured in the course of his employment on one of said steamers while within the State of Ohio, by reason of the alleged negligence of said corporation, is to be determined by the common law and statutes of the State of Ohio, and not by the maritime law

of the United States, contrary to Article 3, Section 2, and Article 6, Clause 2 of the Constitution of the United States.

Fourth. Said Court erred in adjudging by its action aforesaid, that it is competent for the Legislature of Ohio to change the maritime law of the United States by abolishing the defenses of contributory negligence, the fellow servant rule and assumption of risk, and allowing recovery of full indemnity by a seaman injured in his employment and not merely the expense of his maintenance and
60 cure, although the steamer was not unseaworthy and its owner had not failed to supply and keep in order the proper appliances appurtenant thereto, contrary to Article 3, Section 2 and Article 6, Clause 2 of the Constitution of the United States.

Fifth. Said Court erred in adjudging by its action aforesaid, that it is competent for the Legislature of Ohio to require a corporation of Ohio, engaged exclusively in interstate commerce upon the Great Lakes and their tributary and connecting waters, to pay premiums into a State Insurance Fund to provide for the payment of compensation to the employes of such corporation receiving injuries in the course of their employment, regardless of whether there be any liability for such injuries under the maritime law of the United States or the common law or statutes of the State of Ohio, contrary to Article 1, Section 8, Clause 3 of the Constitution of the United States.

Sixth. Said Court erred in adjudging by its action aforesaid that the Act of May 31, 1911 of the Ohio Legislature, then constituting Sections 1465-37 to 1465-79 of the General Code of Ohio and known as the Ohio Workmen's Compensation Act, should be construed as applying to the employment of defendant in error with plaintiff in error, although defendant in error was employed as a seaman on a steamer of plaintiff in error navigating the Great Lakes and their tributary and connecting waters and said employment was maritime in its nature; and in adjudging further that said Workmen's Compensation Act so construed was not in violation of Article 3, Section 2 and Article 6, Clause 2 of the Constitution of the United States.

Seventh. Said Court in adjudging by its action aforesaid, that the said Workmen's Compensation Act should be construed as applying to the employment of defendant in error with plaintiff in error as aforesaid, although defendant in error was not a citizen or resident of Ohio and the contract for his employment was made in the State of Wisconsin, and not to be performed within the State of
61 Ohio or in any definite place, except necessarily on the Great Lakes and their tributary and connecting waters; and in adjudging further that said Worker's Compensation Act so construed was not in violation of Article 3, Section 2 and Article 6, Clause 2 of the Constitution of the United States.

Eighth. Said Court erred in adjudging by its action aforesaid, that the said Workmen's Compensation Act should be construed as applying to plaintiff in error, although engaged exclusively in interstate commerce upon the Great Lakes and their tributary and connecting waters, and in adjudging further that said Workmen's Com-

pensation Act so construed was not in violation of Article 1, Section 8, Clause 3 of the Constitution of the United States.

Ninth. Said Court erred in adjudging by its action aforesaid, that the said Common Pleas Court did not err in denying and refusing to permit plaintiff in error to make the defenses of assumption of risk, the fellow servant rule and contributory negligence, for the reason that plaintiff in error had not paid premiums into the State Insurance Fund as required by the said Workmen's Compensation Act of Ohio, and that the said Workmen's Compensation Act, and particularly Section 21-1 thereof, abolished said defenses as to any employer not making such payments; contrary to the articles and sections of the Constitution of the United States hereinbefore mentioned.

Tenth. Said Court erred in adjudging by its action aforesaid, that the said Common Pleas Court did not err in permitting the defendant in error to recover full indemnity on account of the injuries alleged to have been sustained, and not merely the expense of his maintenance and cure, although the steamer was not unseaworthy and its owner had not failed to supply and keep in order the proper appliances appurtenant thereto, as provided by the maritime law of the United States; contrary to the articles and section of the Constitution of the United States hereinbefore mentioned.

62 Eleventh. Said Court erred in adjudging by its action aforesaid that the said Common Pleas Court did not err in striking out of the answer filed by plaintiff in error the following allegations:

"and assumed the risk of walking upon the deck of said vessel with said hatch cover off."

"Defendant further says that if it be found negligent in any respect, as alleged in said petition, that plaintiff assumed the risk of walking upon said deck in the condition as to lights and hatches as they then were, and that he was guilty of contributory negligence in failing to see that the hatch cover was off before he undertook to cross said hatch,"

contrary to the articles and sections of the Constitution of the United States hereinbefore mentioned.

Twelfth. Said Court erred in adjudging by its action aforesaid, that the said Common Pleas Court did not err in striking out of the amended answer filed by plaintiff in error, the following allegations: "and assumed the risk of walking upon the deck of said vessel with the hatch cover off,"

and

"Defendant further says that if it be found negligent in any respect as alleged in said petition, that plaintiff assumed the risk of walking upon said deck in the condition as to lights and hatches as they then were; and that he was guilty of contributory negligence in failing to see that said hatch cover was off before he undertoook to cross said hatch."

Thirteenth. Said Court erred in adjudging by its action aforesaid, that the Common Pleas Court did not err in charging the jury as follows:

"I say to you as a matter of law, that the defendant was not exonerated or relieved from the operation of the Statutes of Ohio creating a State Insurance Fund for the benefit of injured employes, by the fact that it only operated this steamer for seven months in the year. Being an Ohio corporation, doing business in Ohio and having its general office and place of business in Ohio, it was and is subject to all the provisions of this Act or these statutes. * * * If both were negligent, both the defendant and the plaintiff, and the plaintiff's negligence merely contributed to the injury, then the plaintiff can recover. * * * You have noticed and already something has been said with respect to it, that the petition alleges that the defendant employs regularly more than five workmen and did not avail itself of the provisions of an act of the General Assembly of the State of Ohio creating a State Insurance Fund for the benefit of injured employes. This allegation is admitted, but you are instructed that the defendant was not bound to avail itself of the provisions of this act. It might or might not have done so; as the law stood at the time this cause of action arose, it was wholly optional with
63 the defendant to avail itself of the provisions of this act or not, as it deemed best, and no inference of negligence on its part is to be inferred or assumed by you from the fact that it did not see fit to avail itself of the provisions of this act.

By reason of the provisions of this act, which went into effect June 15, 1911, however, under the evidence and admissions in this case, certain common law defenses to an action for personal injury are not available to the defendant. That is, the defense of the fellow servant rule, the defense of the assumption of risk and the doctrine of contributory negligence, is not available to the defendant in this case.

Without undertaking to define these defenses it will be sufficient to say to you, and you are instructed that if you find from the evidence and a preponderance of it, that the defendant was guilty of negligence which directly and proximately caused the injuries complained of by the plaintiff in his petition, your verdict will be for the plaintiff, even though you find the plaintiff casually shared with defendant or participated with defendant in the act producing the injuries of which the plaintiff complains. That is, the plaintiff is not barred of recovery even if you find he casually shared with the defendant in producing the injuries or contributed to the causes or cause producing the injuries.

To bar the plaintiff of recovery you must find that the injuries were caused wholly and solely by his own negligence and want of ordinary care and were the proximate result of his negligence and want of ordinary care. Secondly, if the act or cause proximately producing the injuries was the act of an officer, agent or employe of the defendant, your verdict will be for the plaintiff. That is, if you find from a preponderance of the evidence that the injuries plaintiff complains of were directly or proximately caused by an act of an officer, agent or employe of the defendant, the Captain or any other officer, even a deckhand of the defendant, your verdict will be for

the plaintiff, irrespective of the fact whether such officer, agent or employe was the fellow servant of plaintiff or not.

The negligence of any servant or employee of the defendant present at the time and participating in the work or being on duty upon the deck, if the negligence of such servant or employe proximately produced or caused the injuries of the plaintiff, would be the negligence of the defendant under the pleadings in this action.

The plaintiff did not assume the risks ordinarily incident to the business in which he was engaged at the time of the injury.

The acquiescence of an ordinarily careful man in the known dangers of employment are risks which he assumes by his contract of employment. Risks of this character, the plaintiff under the evidence in this case, did not assume, under the pleadings and under the law applicable to the case.

To be more specific: Before the enactment of the statute creating a State Insurance Fund for the benefit of injured workmen, the law was in this state that any servant when he entered the services of the employer, impliedly agreed to assume all the risks, dangers and hazards ordinarily and naturally incident to the particular service in which he engaged that were known to him or which might have been known to him by the exercise of ordinary care.

Under the issues and the testimony of this case, you are instructed that the plaintiff did not assume these risks or dangers by reason of his contract of employment with the defendant.

64 The statute just referred to exempts him from the assumption of these risks or dangers. That is all that is meant by the instruction that the doctrine of the assumption of risk is not available to the defendant as a defense to this action,"

contrary to the articles and sections of the Constitution of the United States hereinbefore mentioned.

Wherefore said The Valley Steamship Company prays that the record herein may be reviewed by the Supreme Court of the United States and the said errors therein be corrected, and that the judgment of the Court of Appeals of Ohio for the Eighth District herein may be reversed, and judgment entered for plaintiff in error or the action be remanded to the Common Pleas Court of Cuyahoga County, Ohio, for a new trial.

THE VALLEY STEAMSHIP COMPANY,
By FRANK S. MASTEN, *Its Attorney.*
HOLDING, MASTEN, DUNCAN & LECKIE,
Cleveland, Ohio, Counsel.

65 [Endorsed:] In the Court of Appeals of Ohio for the Eighth District. The Valley Steamship Company, Plaintiff in Error, vs. John J. Wattawa, Defendant in Error. Assignment of Errors and Prayer for Reversal. Filed Mar. 20, 1916. Edmund B. Haserodt, Clerk. Holdin, Masten, Duncan & Leckie,, 1020 Rockefeller Building, Cleveland, Ohio, Attorneys for Plaintiff in Error.

66 UNITED STATES OF AMERICA, *ss:*

To John J. Wattawa, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the State of Ohio for the Eighth District wherein The Valley Steamship Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Oliver Wendell Holmes, Associate Justice of the Supreme Court of the United States, this seventeenth day of March, in the year of our Lord one thousand nine hundred and sixteen.

OLIVER WENDELL HOLMES,
Associate Justice of the Supreme Court of the United States.

67 On this 20th day of March, in the year of our Lord one thousand nine hundred and sixteen, personally appeared Tracy H. Duncan before me, the subscriber, L. C. Huislea, a notary public in and for Cuyahoga County, State of Ohio, and makes oath that he delivered a true copy of the within citation to George H. Eichelberger of the firm of Reed, Eichelberger & Nord, attorneys of record for John J. Wattawa in the Ohio Court of Appeals, on March 18, 1916.

TRACY H. DUNCAN.

Sworn to and subscribed the 20th day of March, A. D. 1916.

[Notarial Seal, Cuyahoga County, Ohio.]

L. C. HUISLEA,
Notary Public in & for Cuyahoga County, Ohio.

[Endorsed:] 597. 136,647. Filed Mar. 20, 1916. Edmund B. Haserodt, Clerk.

68 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable the Judges of the Court of Appeals of the State of Ohio for the Eighth District, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Valley Steamship Company and John J. Wattawa, wherein was drawn in question the validity of a treaty or statute of, or an

authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity
69 was claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said The Valley Steamship Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the seventeenth day of March, in the year of our Lord one thousand nine hundred and sixteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by
OLIVER WENDELL HOLMES,
Associate Justice of the Supreme Court of the United States.

70 [Endorsed:] 597. 136,647. Supreme Court of the United States, October Term, 1915. The Valley Steamship Company, Plaintiff in Error, vs. John J. Wattawa. Writ of Error. Filed Mar. 20, 1916. Edmund B. Haserodt, Clerk.

71 In the Court of Appeals of Ohio for the Eighth District.

THE VALLEY STEAMSHIP COMPANY, Plaintiff in Error,
vs.
JOHN J. WATTAWA, Defendant in Error.

Supersedeas Bond.

Know all men by these presents that The Valley Steamship Company, a corporation of Ohio, as Principal, and The Globe Indemnity Company, a corporation of New York, as Surety, are held and firmly

bound unto John J. Wattawa in the sum of Ten Thousand Four Hundred Twenty-five and 12/100 Dollars ($10,425.12) to be paid to the said obligee, his representatives and assigns, for the payment of which well and truly to be made said The Valley Steamship Company and The Globe Indemnity Company do bind themselves, their successors and assigns, jointly and severally by these presents. Sealed with their corporate seals and dated this 14th day of March, 1916.

Whereas said The Valley Steamship Company as plaintiff in error has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Court of Appeals of Ohio for the Eighth District.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its writ of error to effect, and answer all costs and damages if it shall fail to make good its pleas, then this obligation shall be void; but otherwise shall remain in full force and effect.

[Seal The Valley Steamship Company, Mentor, Special District, O.]

THE VALLEY STEAMSHIP COMPANY,
By E. A. WILLIAMS, *Secretary.*

[Seal Globe Indemnity Company of New York.]

THE GLOBE INDEMNITY CO. OF NEW YORK,
By JAMES SMART, *Attorney-in-Fact.*
By PAUL C. SEARLES, *Attorney-in-Fact.*

Signed and acknowledged in presence of:

TRACY H. DUNCAN.
FRANK S. ULNSTED.

[United States internal revenue documentary stamp, series of 1914, twenty-five cents, canceled 3/14/16. G. I. Co.]

[United States internal revenue documentary stamp, series of 1914, one cent, canceled 3/14/16. G. I. Co.]

[United States internal revenue documentary stamp, series of 1914, one-half cent, canceled 3/14/16. G. I. Co.]

72 THE STATE OF OHIO,
Cuyahoga County, ss:

Before me a Notary Public in and for said County and State, personally appeared the above named The Valley Steamship Company, by C. A. Williams, its Secretary, who acknowledged that he did sign the foregoing instrument, and that the same is the free act and deed of said corporation, and his free act and deed personally and as such officer.

In testimony whereof, I have hereunto set my hand and official seal at Cleveland, Ohio, this 14th day of March, 1916.

[Notarial Seal, Cuyahoga County, Ohio.]

TRACY H. DUNCAN,
Notary Public.

THE STATE OF OHIO,
Cuyahoga County, ss:

Before me a Notary Public in and for said County and State, personally appeared the above named The Globe Indemnity Company of New York, by James H. Smart & Paul C. Searles, Attorneys in Fact, who acknowledged that they did sign the foregoing instrument and that the same is the free act and deed of said corporation, and their free act and deed personally and as such attorney in fact.

In testimony whereof I have hereunto set my hand and official seal, at Cleveland, Ohio, this 14th day of March, 1916.

[Notarial Seal, Cuyahoga County, Ohio.]

F. C. BOND,
Notary Public.

I hereby approve the foregoing bond and sureties, this 16th day of March, 1916.

OLIVER WENDELL HOLMES,
Associate Justice of the Supreme Court of the United States.

73 [Endorsed:] Court of Appeals of Ohio, Eighth District. The Valley Steamship Company, Plaintiff in Error, vs. John J. Wattawa, Defendant in Error. Supersedeas Bond. Filed Mar. 20, 1916. Edmond S. Haserodt, Clerk. Holding, Masten, Duncan & Leckie, 1020 Rockefeller Building, Cleveland, Ohio, Attorneys for Plaintiff in Error.

74 In the Court of Appeals of Ohio for the Eighth District.

THE VALLEY STEAMSHIP COMPANY, Plaintiff in Error,
vs.
JOHN J. WATTAWA, Defendant in Error.

Precipe.

To the Clerk of said Court of Appeals:

Please include the following in the transcript of record to be authenticated by you and returned to the Supreme Court of the United States with the writ of error issued by the Supreme Court of the United States to the said Court of Appeals:

1. Petition in Court of Common Pleas.
2. Answer in Court of Common Pleas.

3. Motion in Court of Common Pleas to strike from the answer and the brief.
4. Amended answer in Court of Common Pleas.
5. Reply in Court of Common Pleas.
6. Motion for new trial in Court of Common Pleas.
7. Petition in error in Court of Appeals.
8. Docket and Journal Entries in Court of Appeals.
9. Docket and Journal Entries in Court of Common Pleas.
10. Bill of Exceptions in Court of Common Pleas.
11. Brief of plaintiff in error in Court of Appeals commencing with page eight and ending on page fifty-four at the caption "Plaintiffs were not without experience. They had worked about hatches."
12. Opinion of Court of Appeals;

and transmit said authenticated transcript of record, together with the assignment of errors and prayer for reversal and citation
75 to defendant in error and writ of error, to the Supreme Court of the United States.

HOLDING, MASTEN, DUNCAN & LECKIE,
Attorneys for Plaintiff in Error.

Service of copy of the foregoing Precipe this 30th day of March, 1916, is hereby acknowledged.

REED, EICHELBERGER & NORD,
Attorneys for Defendant in Error.

76 [Endorsed:] In the Court of Appeals of Ohio for the Eighth District. The Valley Steamship Company, Plaintiff in Error, vs. John J. Wattawa, Defendant in Error. Precipe. Filed Court of Appeals. Mar. 20, 1916. Cuyahoga County, Ohio. Edmund B. Haserodt, Clerk.

77 In the Court of Appeals of Ohio for the Eighth District.

THE VALLEY STEAMSHIP COMPANY, Plaintiff in Error,
vs.
JOHN J. WATTAWA, Defendant in Error.

Supplementary Precipe.

To the Clerk of said Court of Appeals:

In addition to the items mentioned in the precipe heretofore filed, please include in the transcript of record to be authenticated by you and returned to the Supreme Court of the United States with the writ of error issued by the Supreme Court of the United States to the said Court of Appeals, certified copy of the rule of said Court requiring the filing of brief by Plaintiff in Error.

HOLDING, MASTEN, DUNCAN & LECKIE,
Attorneys for Plaintiff in Error.

Service of copy of the foregoing Supplementary Precipe this 7 day of April, 1916, is hereby acknowledged.

REED, EICHELBERGER & NORD,
Attorneys for Defendant in Error.

78 & 79 [Endorsed:] In the Court of Appeals of Ohio for the Eighth District. The Valley Steamship Co., Plaintiff in Error, vs. John J. Wattawa, Defendant in Error. Supplementary Precipe. Filed Court of Appeals, Apr. 7, 1916. Cuyahoga County, Ohio. Edmund B. Haserodt, Clerk. Holding, Masten, Duncan & Leckie, 1020 Rockefeller Building, Cleveland, Ohio, Attorneys for Plaintiff in Error.

80 *Petition.*

(Filed in Common Pleas Court Nov. 5, 1913.)

The plaintiff, for his cause of action, says:

That the defendant, The Valley Steamship Company, is a corporation, organized and existing under and by virtue of the laws of the State of Ohio, maintaining its general office and place of business in the City of Cleveland, Cuyahoga County, Ohio.

That said company is engaged in carrying bulk freight upon the Great Lakes and their connecting and tributary waters, and in the pursuit of such business it owns and operates a large fleet of steam vessels, among which was the steamer "Edwin N. Ohl"; which said steamer was owned and operated by the defendant and manned by its officers and agents. That the said steamer "Edwin N. Ohl" was a large vessel of about seventy-five hundred tons carrying capacity, and over five hundred feet in length, and had upon the decks thereof twenty-three hatches, extending across almost the entire width of the boat, and said hatches were nine feet in width and were situated close together along the deck of the said vessel, and were covered by collapsable steel hatch covers, which were opened and closed by means of machinery upon the deck of the said vessel.

That in the operation of the said steamer the defendant company had regularly employed more than five workmen or operatives and the defendant was not, at the times hereinafter mentioned, a
81 subscriber or contributor to the State Insurance Fund of the State of Ohio, as provided by the Workmen's Compensation Law of the State of Ohio for the protection of employees.

The plaintiff says that on or about the 2nd day of September, 1913, and for a few days prior thereto, the plaintiff was, and had been, in the employ of the defendant working as a deck hand upon the said steamer "Edwin N. Ohl," for the defendant company, and that on the said 2nd day of September, 1913, the said steamer was tied to the dock in the harbor at Sandusky, Ohio, where it had been moored for several days for the purpose of being loaded with coal from the said dock.

That the plaintiff had worked in and upon said steamer as a deck hand for but a few days, and had had but a few days' prior

acquaintance with, and experience in and about steamers. That he was then twenty-three years of age, and had had but a few days' previous experience as a deck hand; all of which the defendant well knew, or in the exercise of due care could have known.

Plaintiff further says that about 10:00 o'clock in the evening of the said 2nd day of September, 1913, the plaintiff went aft along the deck of the said steamer to the quarters provided for deck hands, and in passing along the deck walked over the hatches of the said steamer, which were covered, for some distance, when suddenly and unexpectedly, when stepping from one hatch cover to the
82 place where the next hatch cover should have been, without fault on his part, he stepped into the open hatch in said vessel, which had been negligently left uncovered by the defendant company, and the plaintiff fell to the bottom of said boat through the said open hatch-way and his left leg was broken and fractured in two places above the knee and in one place below the knee, and the bones of his said leg were so shattered that in uniting they are out of alignment, and his left leg is weakened and stiffened and is permanently injured; and his left arm was broken near the wrist and the bones of the said arm were splintered and injured so that the movement of the left arm is limited and the use thereof is permanently impaired, all to his permanent injury; and the plaintiff's lower jaw bone was fractured, and he has not full use of his jaw, and he has suffered great pain and injury therefrom; and the drums of his ears were ruptured, causing intense pain and bleeding and partial loss of hearing.

Plaintiff says that at the time he was walking along said deck he believed the fact to be that all the hatches on said steamer were closed; that the said open hatch in which he stepped was not guarded or protected by lights, or by warning of any character, and that the lights in the hold of the said steamer which should have been burning when the hatches on said steamer were open, were not burning, but were out. Plaintiff further says that the deck of said steamer was dark, and there were no lights of any kind on the
83 deck by which he could see that the said hatch was open, uncovered and unguarded.

Plaintiff further says that he had received no warning or instructions from the defendant company or its officers and agents that said hatch was open and unguarded, and that he did not know, nor could he in the exercise of ordinary care on his part have known that said hatch was open. Plaintiff further says that at the time he received the injuries aforesaid the said steamer was not engaged in taking on a cargo of coal, but was lying waiting until such time as it could begin loading, and that there was not then any occasion for such hatch being open or uncovered.

Plaintiff says that the aforesaid injuries were caused to him directly and proximately by the negligence of the defendant in the following particulars, to-wit:

I.

In that the defendant carelessly and negligently opened and un-

covered the said hatch while the said steamer was lying moored at the dock and was not engaged in receiving any cargo through the said hatch.

II.

The defendant carelessly and negligently failed to close the said hatch at the approach of darkness so that those employed in and about said steamer would not walk into said open hatch in the
84 darkness.

III.

The defendant carelessly and negligently failed to place near and about said open hatchway any lights to warn those upon the deck of the said steamer of the fact that the said hatch was open.

IV.

The defendant carelessly and negligently failed to guard said open hatchway and to protect the same in any way to prevent those upon the deck of said steamer from falling therein.

V.

The said defendant was negligent and careless in failing to keep the lights in the hold of said steamer burning while the said hatch was open and uncovered.

VI.

The defendant was negligent and careless in not warning and instructing the plaintiff of the fact that the said hatch was open and uncovered, and not warning and instructing the plaintiff on the danger incident to the said hatch being open, unguarded and not illuminated.

VII.

The defendant was negligent and careless in that it did then and there maintain a defective and unsafe condition in its ways and works, in that the defendant had negligently failed to guard
85 and protect the said open hatch-way, and that it had failed to place any lights or means of warning about the same, or to maintain any lights in the hold of said steamer, and the deck of said steamer was in an unsafe and defective condition, in that the said deck was not illuminated in order that those on and about the deck of said steamer would know that the said hatchway was open.

Plaintiff says that at the time he fell in said open hatch-way he did not see that the said hatch-way was open, unguarded and protected, and that he could not have discovered the same by the exercise of due care upon his part, and that he was at the time he fell in the said hatch-way rightfully upon the deck of said steamer in pursuance of his employment, and was in the exercise of due care for his own safety at the time he received the aforesaid injuries.

Plaintiff says that as a result of the injuries set forth above he has been caused great pain and suffering and mental and physical anguish; he has been put to large expense for medical care and treatment, and will continue to suffer pain; that he has suffered loss of wages and his earning capacity is permanently destroyed; that he has been deformed and is disfigured permanently and by no reason of his injuries he has suffered damage in the sum of Twenty Thousand ($20,000.00) Dollars.

86 Wherefore, the plaintiff asks judgment against the defendant in the sum of Twenty Thousand ($20,000.00) and his costs herein.

REED & EICHELBERGER AND
H. J. NORD,
Attorneys for Plaintiff.

(Duly verified.)

Answer.

(Filed in Common Pleas Court Dec. 6, 1913.)

Defendant for answer to the petition herein filed admits it is and was at all times mentioned therein, a corporation of Ohio; and says it was at all of said times engaged in interstate commerce, and was at the time said injuries are alleged to have been received.

It admits it was and is owner of the steamer Edwin N. Ohl, and says that she is a modern vessel, fitted with hatches in the usual manner, and was operated by defendant, through its officers and agents.

It admits that in the operation of said steamer it employed more than five men, and that it was not at the time mentioned a subscriber or contributor to the State Insurance Fund of Ohio.

Defendant admits that on September 2, 1913, and for some — prior thereto, plaintiff, who it says was and is a non-resident of Ohio, was and had been in the employ of said steamer, which

87 was at the time of the alleged injuries moored in Sandusky Harbor, waiting to take on a cargo of coal to be carried to the port of Superior in the State of Wisconsin.

Defendant says that the hatch cover of the hatch into which plaintiff fell was removed for the purpose of being in readiness to take on cargo; that it was and had been for many years a uniform and universal custom to so remove hatch covers for such purpose, and that said custom was well known and universally acquiesced in by those engaged in navigating and operating vessels upon the Great Lakes and tributary waters.

Defendant further says that plaintiff assisted in removing said hatch cover, and knew it was off, and assumed the risk of walking upon the deck of said vessel with said hatch cover off. That at the time plaintiff approached said hatch there were lights in the hold at said hatch, upon the deck and upon the dock near by, and that said lights were sufficient to have enabled plaintiff and anybody upon the deck of said vessel to see that said hatch cover was off, and plaintiff knew, or in the exercise of ordinary care could have seen said

hatch cover was off before he reached said hatch, and that he was guilty of negligence directly and proximately causing any injuries he received in attempting to cross said hatch with the cover removed under said circumstances.

Defendant says that plaintiff knew of the danger of stepping into an open hatch, and that it was not its duty to warn or in-
88 struct plaintiff of or concerning said danger, or to give him any warning, except by light at the hatch, that the hatch cover he had assisted in removing was off; but, on the contrary, it was plaintiff's duty to ascertain whether the same remained off after he and others had removed the same.

Defendant admits that plaintiff fell into said hatch and that he was injured, but denies he was injured in the manner or as severely as alleged, and says any injuries he received were due wholly and solely to his own negligence.

Defendant denies each and every allegation in said petition contained not hereinbefore admitted to be true.

Defendant further says that if it be found negligent in any respect as alleged in said petition, that plaintiff assumed the risk of walking upon said deck in the condition as to lights and hatches as they then were; and that he was guilty of contributory negligence in failing to see that said hatch cover was off before he undertook to cross said hatch.

Wherefore, defendant prays that the petition be dismissed.

HOLDING, MASTEN, DUNCAN & LECKIE,
Attorneys for Defendant.

(Duly verified.)

89 *Motion to Strike from the Answer.*

(Filed in Common Pleas Court December 17, 1913.)

Now comes the plaintiff, through his attorneys, Reed & Eichelberger, and moves to strike *on* the answer herein filed the following:

First. On the second page of said answer and in the sixth paragraph thereof the following language: "And assume the risk of walking upon the deck of said vessel with said hatch cover off."

Second. The entire final paragraph of the said answer, the same being as follows: "Defendant further says that if it be found negligent in any respect as alleged in the petition, then plaintiff assumed the risk of walking upon said deck and the condition as to lights and hatches as they then were; and that he was guilty of contributory negligence in failing to see that said hatch cover was off before he undertook to cross said hatch."

REED & EICHELBERGER,
Attorneys for Plaintiff.

Brief.

The petition alleges that the defendant had not complied with the Workmen's Compensation Act in that it failed to pay any

premiums into the State Insurance Fund and thereby give its employees the benefit of a compensation provided for by statute. This fact, together with the fact that it employed more than five workmen, it admitted in the answer.

90 Under this state of facts the statute expressly deprives the defendant of the right to offer as a defense the assumption of risk by the plaintiff or his contributory negligence.

Not being allowed to offer this defense, it is improper to plead the same as an answer. The sole question to determine in this case is whether the defendant was negligent in any of the respects mentioned in the petition. See Workmen's Compensation Act; State of Ohio, 102 Ohio Laws; also 103 Ohio Laws, page 82, Section 26.

REED & EICHELBERGER,
Attorneys for Plaintiff.

Amended Answer.

(Filed in Common Pleas Court March 19, 1914.)

Defendant for amended answer to the petition herein filed admits it is and was at all times mentioned therein, a corporation of Ohio, and says it was at all of said times engaged in interstate commerce, and was at the time injuries to plaintiff are alleged to have been received.

It admits it was and is owner of the steamer Edwin N. Ohl, and says that she was at the time alleged in the petition, a modern vessel, fitted with hatches in the usual manner, and says she was operated by defendant, through its officers and agents, as authorized and directed by the laws of the United States.

91 Defendant says that when said steamer was being operated it employed more than five men, but that said steamer was not operated at any time to exceed seven months in the year, and that it was not required by the statutes of Ohio to become a subscriber or contributor to the state insurance fund of Ohio.

Defendant admits that on September 2, 1913, and for some time prior thereto, plaintiff, who it says was and is a non-resident of Ohio, was and had been in the employ of said steamer, which was at the time of the alleged injuries moored in Sandusky Harbor, waiting to take on a cargo of coal to be carried to the port of Superior in the State of Wisconsin.

Defendant says that the hatch cover of the hatch into which plaintiff fell was removed for the purpose of being in readiness to take on cargo; that it was and had been for many years a uniform and universal custom to so remove hatch covers for such purpose, and that said custom was well known and universally acquiesced in by those engaged in navigating and operating vessels upon the Great Lakes and tributary waters.

Defendant further says that plaintiff assisted in removing said hatch cover, and knew it was off (and assumed the risk of walking upon the deck of said vessel with said hatch cover off). That at the time plaintiff approached said hatch there was lights in the hold

at said hatch, upon the deck and upon the dock near by,
92 and that said lights were sufficient to have enabled plaintiff
any anybody upon the deck of said vessel to see that said hatch cover was off, and plaintiff knew, or in the exercise of ordinary care could have seen said hatch cover was off before he reached said hatch, and that he was guilty of negligence directly and proximately causing any injuries he received in attempting to cross said hatch with the cover removed under said circumstances.

Defendant says that plaintiff knew of the danger of stepping into an open hatch, and that it was not its duty to warn or instruct plaintiff of or concerning said danger, or to give him any warning, except by the hatch light, that the hatch cover he had assisted in removing was off; but, on the contrary, it was plaintiff's duty to ascertain whether the same remained off after he and others had removed the same.

Defendant admits that plaintiff fell into said hatch and that he was injured, but denies he was injured in the manner or as severely as alleged, and says any injuries he received were due wholly and solely to his own negligence.

Defendant denies each and every allegation in said petition contained not hereinbefore admitted to be true.

(Defendant further says that if it be found negligent in any respect as alleged in said petition, that plaintiff assumed the risk of walking upon said deck in the condition as to lights and
93 hatches as they then were; and that he was guilty of contributory negligence in failing to see that said hatch cover was off before he undertook to cross said hatch.)

Wherefore, defendant prays that the petition be dismissed.

HOLDING, MASTEN, DUNCAN & LECKIE,
Attorneys for Defendant.

(Duly verified.)

NOTE.—Words in parenthesis stricken out by order of Court on motion of plaintiff.

Reply.

(Filed in Common Pleas Court March 20, 1914.)

Now comes the plaintiff in the above entitled action and for his reply to the amended answer filed by the defendant herein, he denies each, all and singular the allegations and averments in said answer contained which are not admissions of and not consistent with the allegations and averments contained in the plaintiff's petition.

REED, EICHELBERGER & NORD,
GEORGE W. RITTER.

(Duly verified.)

Motion for New Trial.

(Filed in Common Pleas Court March 25, 1914.)

Now comes defendant and moves the court to set aside the verdict rendered herein, and to grant defendant a new trial for the following reasons:

94 1. The verdict is contrary to the weight of the evidence.

2. The verdict is not sustained by sufficient evidence.

3. The verdict is contrary to law.

4. The court erred in admitting testimony introduced by plaintiff, to which the defendant duly objected and excepted.

5. The court erred in rejecting evidence tendered by defendant, to which defendant duly excepted.

6. The court erred in its charge to the jury.

7. The court erred in refusing to charge the jury as requested by defendant, to which refusal defendant duly excepted.

For other errors occurring at the trial to which exception was duly taken.

HOLDING, MASTEN, DUNCAN & LECKIE,
Attorneys for Defendant.

Petition in Error.

(Filed in Court of Appeals June 15, 1914.)

Plaintiff in error says that at the January Term, 1914, of the Court of Common Pleas of Cuyahoga County, Ohio, defendant in error recovered a judgment by the consideration of said court against plaintiff in error, in an action then pending therein, wherein defendant in error was plaintiff and plaintiff in error was defendant, a transcript of Docket and Journal Entries and Bill of Ex-

95 ceptions are filed herewith and made part hereof.

Plaintiff says that there is error in said record and proceedings in this, to-wit:

1. The court erred in sustaining the motion made by plaintiff below to strike out of the answer filed in said cause by the defendant, the following allegations, to which defendant below duly excepted:

"And assumed the risk of walking upon the deck of said vessel with said hatch cover off," and in striking out the following:

"Defendant further says that if it be found negligent in any respect as alleged in said petition, that plaintiff assumed the risk of walking upon said deck in the condition as to lights and hatches as they then were, and that he was guilty of contributory negligence in failing to see that the hatch cover was off before he undertook to cross said hatch."

2. The court erred in sustaining the motion made by plaintiff below to strike from the files the amended answer of defendant below, to which defendant below duly excepted.

Plaintiff says that there was error in granting said motions in this, to-wit: That at the time of the injuries complained of, defendant below was engaged in navigating the vessel, upon which plaintiff was employed, in interstate commerce, and in the navigation thereof was subject to the laws of the United States; that plaintiff
96 below was a seaman on said vessel under a maritime contract between him and defendant, entered into in the State of Wisconsin; that the respective duties and obligations of the parties under such contracts have for many years been defined, determined and fixed by the general maritime law of the United States; that the statute of Ohio known as the "Workmen's Compensation Act", approved March 14, 1913, interferes with, abridges and impairs the rights and enlarges the duties and obligations of defendant below and increases its responsibilities, as defined, determined and fixed by the maritime laws of the United States, which by operation of law became and were incorporated into and became a part of said contract, contrary to Article II, Section 28 of the Constitution of Ohio, and Article 1, Section 10 of the Constitution of the United States.

3. The court erred in the admission of testimony introduced by plaintiff below to which defendant below duly objected and excepted.

4. The court erred in rejecting testimony offered by defendant below, to which ruling defendant duly objected and excepted.

5. The court erred in its charge to the jury.

6. The court erred in refusing to charge the jury as requested.

7. The verdict is contrary to law.

8. The verdict is against the manifest weight of the evidence.

97 9. The verdict of the jury is not sustained by sufficient evidence.

10. The court erred in overruling the motion of defendant below for a new trial.

11. For other errors appearing in the record.

Wherefore, plaintiff in error prays that said judgment may be reversed, and that it may be restored to all things it has lost by reason thereof.

HOLDING, MASTEN, DUNCAN & LECKIE,
Attorneys for Plaintiff in Error.

(Summons in Error omitted.)

Docket and Journal Entries.

In the Court of Common Pleas.

Money Only.

September Term, 1913.

Nov. 5th, 1913. Petition and precipe filed and summons issued.
Nov. 13th, 1913. Summons returned endorsed: On the 12th day of November, 1913, I served this writ on the within named, The Valley Steamship Com-

pany, a corporation, by delivering a true and certified copy thereof with all the endorsements thereon to Charles Williams, Secretary of said corporation. The President or other officers not found in my County. Sheriff Smith. Fees .91.

Dec. 6th, 1913. Answer filed.

Dec. 17th, 1913. Motion by plaintiff to strike from answer with notice and brief filed.

98 January Term, 1914.

Jan. 12th, 1914. To Court: The motion by the plaintiff to strike certain matters from the defendant's answer is heard and granted, to which the defendant excepts. Journal 194, page 52.

March 19th, 1914. Amended answer filed.

March 20th, 1914. Reply by plaintiff filed.

March 24th, 1914. To Court: The parties by their attorney come and a jury is empaneled and sworn, who after due trial "do find for the plaintiff" and assess his damages at Fifty-two Hundred Dollars ($5200.00). Journal 194, page 768.

March 25th, 1914. Motion by defendant for a new trial filed.

April Term, 1914.

April 11th, 1914. To Court: The motion by the defendant for a new trial of this case, is heard and overruled, to which the defendant excepts. It is therefore considered that said plaintiff recover of said defendant his said damages and also his costs of this suit. Judgment is rendered against the defendants for the costs herein. Journal 195, page 53.

May 12th, 1914. Bill of Exceptions by defendant filed and notice issued.

May 14th, 1914. Notice of Bill returned endorsed: On the 13th day of May, 1914, I served this notice on the within named, John J. Wattawa, by delivering a true and certified copy thereof, to C. S. Reed, of the firm of Reed, Eichelberger & Nord, attorneys of record for said John J. Wattawa. Sheriff Smith. Fees .91.

99 May 25th, 1914. Bill of Exceptions transmitted to trial judge.

May 27th, 1914. Bill of Exceptions received from trial judge.

June 15th, 1914. Petition in error filed in Court of Appeals by defendant.

Docket and Journal Entries.

In the Court of Appeals.

Error to Common Pleas.

January Term, 1914.

June 15, 1914. Petition in error, waiver of process, transcript and original papers from Common Pleas filed.

August 19, 1914. Brief by plaintiff in error with two copies and proof of service filed.

September 5, 1914. Brief by defendant in error with two copies and proof of service filed.

December 24, 1914. To Court: This cause came on to be heard upon the pleadings, and the transcript of the record in the Court of Common Pleas, and was argued by counsel; and on consideration of all the assigned errors, the court being of the opinion that substantial justice has been done the party complaining, the judgment of the said Court of Common Pleas is affirmed, there being, however, in the opinion of the court, reasonable ground for this proceeding in error. It is therefore considered that said defendant in error recover of said plaintiff in error his costs herein. Or-
100 dered that a special mandate be sent to the Court of Common Pleas, to carry this judgment into execution. To all of which the plaintiff in error excepts. Journal 2, page 46.

Bill of Exceptions.

CAPTAIN RICHARD NEVILLE, called by plaintiff as witness, who testified that he had been a lake captain for ten years, and of the steamer Edwin N. Ohl for two seasons; that she belongs to The Valley Steamship Company and that he was her master in September, 1913; that her length was something like 445 feet over all, her carrying capacity about 8000 tons; that she had 23 hatches, 9 feet wide and about 40 feet long; that when the hatch covers are off it is three feet between the hatch coamings; that it is 12 feet from center of one hatch to the center of the other; that they were steel, fold on top of one another, slide off, known as telescopic and collapsible hatches; that they are moved by a cable attached to a machine on deck; close one-half of a hatch at a time; that the vessel carried 23 of a crew, including the captain.

"Q. And that was the regular crew for the entire season of navigation?

A. Yes, sir.

Q. 1913, can you tell how long the season of navigation was open?

A. Well, we left Fort William on the 19th of April in the spring. We got into Duluth in the fall of the year, the 6th of December.

101 Q. You laid up at Duluth, did you that winter?

A. Yes, sir."

Cross-examination:

On cross-examination he says that the keel of the Edwin N. Ohl was 420 feet, her width 54 feet; that she was built of steel and had 23 hatches; that her boiler house was in the after part of the ship back of No. 23 hatch a distance of 18 feet; that on the night of the occurrence the vessel was equipped with electric lights; that there were two lights on the forward side of the boiler house, one on each corner; that these two lights were about 38 feet apart; that they were electric lights of 16 candle power; that the boiler house was painted white; that those lights were a proper equipment for the ship; that No. 22 hatch was about 30 feet from these lights; that on the night of September 2, 1913, she was also equipped with electric lights in the cargo hold; that the vessel's hold was divided into four compartments with 24 electric lights in each compartment, operated by the ship's own dynamo; that these lights were fastened right under the hatch; that in the after compartment there were six hatches from 17 to 23; that there were two lights at the end of each hatch; that these lights threw light all over the cargo hold and illuminated the deck above and the light can be seen through the open hatches; that the vessel was lying head into the slip with her port side to the dock; that there was another vessel lying there about 20 or 25 feet away; that they were opposite each other in the slip, side of his vessel being

102 about 25 feet from the side of the other and the other vessel was loading coal from the car dump, which car dump was about 75 feet from the Ohl.

Further to maintain the issues, plaintiff introduced as witness GEORGE LORD, who testified that he lived in Chicago; that he was a steamboat man, seaman, and had obtained a license as a pilot; that he had been sailing steamboats about 17 years all over the lakes and had worked on boats of every kind, including large bulk freighters; that he is familiar with collapsible steel hatches; that he had been on different lines of vessels during 24 years; that he has a mate's license and is familiar with the customs and usages on the Great Lakes as to the managing of hatches and covering them on vessels; that he never worked on the steamer Edwin N. Ohl but had seen her.

* * * * * * *

Q. Is there a custom upon the great lakes and their connecting tributary waters with regard to the handling of hatches and hatch covers?

A. Why, there is a custom to it.

Q. Now, what is that custom?

A. The custom is to keep the hatch covers closed at night time or keep lights around them to guard them in some way, to keep men from falling into them.

Q. What guards do they use?

A. Some boats stretches a line across, lights around the hatches, heaving line or something to cut off the way. There is
103 different methods. Some boats has a regular chain that they put around the hatches.

Q. What is the custom regarding opening hatches with regard to the time when a vessel begins to take on cargo?

The Court: If there is such a custom?

A. It is customary to open hatches and have them ready when she goes to the coal dump, providing she is going to load right away.

Q. What is the truth with regard to when she is not at the dock?

A. When she is not at the dock the hatches is supposed to be closed unless they are working in the hold.

Cross-examination:

On cross-examination he said he had been sailing the lakes for twenty-four years, first as a boy on a sailing vessel, then as a deck-hand for four or five years.

* * * * * * *

Q. Do I understand you to say that an open light on the deck at the hatch means anything to a deck hand?

A. An open what?

A. A light at an open hatch means anything to a deck hand?

A. Why, it signifies something, that light being set at the hatch coaming.

Q. Tell us what it signifies?

A. Signifies that a hatch is open, I suppose.

Q. Now, if a light be in the hold, that would be lighting the hatch, according to your statement, wouldn't it?

A. Yes, sir.

104 Q. The lights in the hold, what does that signify when you see a light in the hold?

A. You would know the hatch is open, I suppose, if you saw the light there.

Q. What does it signify if you see a pile of those, I mean after you have telescoped the hatch cover back, what does that signify?

A. Signifies they are on the side and piled up there.

Q. Now, what does that signify, signifies the hatch is open, doesn't it?

A. Yes, sir.

Q. Now, you have seen hatches open in port before, haven't you?

A. Yes, sir.

Q. You have seen hatches opened when the vessel comes to a dock to take on cargo, haven't you?

A. Yes, sir.

Q. Both night and day?
A. Yes, sir.
Q. Seen hatches removed as the vessel moved to take out a cargo, haven't you?
A. Yes, sir.
Q. You have seen hatches removed after the master of the ship has got notice to be in readiness to take on a cargo, haven't you?
A. Yes, sir.
Q. That was customary, wasn't it, Mr. Lord?
A. Yes, sir.
Q. And on all the kind of ships you sailed on since you were cabin boy up to the present time, that is so, isn't it?
A. Yes, sir, correct.
Q. Now, Mr. Lord, these big modern ships that have these collapsible hatch covers, as you walk along the deck it is all open, isn't it, all open as you walk along the deck?
A. What do you mean by open?
105 Q. Well, now, if you walk along the deck of one of those ships in daylight you can see the whole deck, can't you?
A. See the whole deck.
Q. And if you walk along the deck in the night time and there is sufficient light, you can see the whole deck, can't you?
A. If there is sufficient light, yes, sir.
Q. Now, suppose a lantern was set upon a pile of hatch covers these collapsible hatch covers that have been telescoped on the side of the ship, you can see the whole length of the ship, can't you?
A. Yes, sir.
Q. And don't that indicate now to a deck hand or to anybody about the boat, that the hatches are off when you see a light sitting on the hatch covers that way?
A. Yes, sir.
Q. Now, have you ever served on what was known as a "pig"?
A. Yes, sir, I have.

The Court: You mean a whaleback?
Mr. Holding: Yes, sir; those are called pigs.

Q. That is where you saw the line around the hatch, wasn't it?
A. Yes, sir. I saw them on a pig.
Q. That is where you did see them, wasn't it?
A. Yes, sir.
Q. Now, that is, because, isn't it, Mr. Lord, that their decks are rounded, aren't they, decks on a pig are rounded or sloping, as you would say?
A. It wasn't the line I was referring to.
Q. That is not what I am asking you. I am asking you about whether the decks of the pigs are sloping?
A. Yes, sir, they are sloping.
106 Q. Now, is there any coaming to the hatches on the decks of a pig?
A. They didn't use to be, some of them got them now.
Q. What do you mean by coamings of hatches?

A. The coaming of hatches is what the hatch sets on, what it is fit on.

Q. These gentlemen have all said they are not sailors; what do you mean by the coaming of a hatch?

A. The same as this here (indicating); that would be the coaming.

Q. In other words, it is a raising of the deck at the hatch, isn't it?

A. Yes, sir.

Q. The old vessels had that kind of coaming, did they?

A. Not the old pigs, no.

Q. All except your pigs?

A. Yes, sir.

Q. Now, do you know whether the Steamer Ohl had that kind of a coaming?

A. She had a raised coaming, I believe.

Q. You had never been on the Ohl?

A. Never been on her, no, sir. I have seen her. I have never been on her.

Redirect examination.

By Mr. Eichelberger:

Q. You say you have seen lines put upon the hatches on the pigs, Mr. Lord?

A. Yes, sir.

Q. State what the fact is as to having lines around the hatches on other kinds of vessels.

A. Well, I have been on vessels loading lumber and different class of vessels where they wouldn't put the hatches on at
107 night time, put a couple of boards across the hatch as a preventative to keep anybody from falling down and maybe stretch a heaving line along. I have been on ore boats where they stretched the heaving lines along to keep them going forward and aft on the dock side of the vessel when loading or unloading, that is what I mean.

Q. Now, Mr. Holding asked you about the lights in the hold: just tell the jury where those lights are that he talked about in the hold, where are they, where the light is shown by those lights?

A. Well, I don't just know where they were, I never was aboard of her, but on most steamboats they are at each hatch. They usually put two on each side of the hatch and they are up against the deck and they shine down from the deck to light up the hold.

Q. They are not there to light up any part of the deck?

A. They are not there to light up the deck, they are there to light up the hold. They are up in behind the beams where they won't get broke.

Q. The light is thrown downward?

A. The light is thrown downward.

Q. In other words, Mr. Lord, they are on the under side of the alleyway along the edge of the deck?

A. Yes, sir.

Recross-examination.

By Mr. Holding:

On recross-examination he testified:

* * * * * * *

Q. And so the light in the vessel, notwithstanding it is to
108 light up the hold, it also can be seen from the deck of the vessel, can't it?

A. Well, yes, it can be seen from the deck of the vessel.

Q. Now, let us take this line business that you say you have seen upon vessels, I mean ore carriers, that is when the vessel has been loading, isn't it?

A. Yes, sir, unloading.

Q. And it has been when the buckets have been going back and forward on one side of the ship or the other?

A. Yes, sir.

Q. Those lines are to prevent anybody from going on that side of the ship where the buckets are emptying over?

A. Yes, sir.

Q. In other words, it is dangerous to pass under these buckets because a piece of coal or piece of ore may fall out of the bucket on somebody's head?

A. Yes, sir, that is the idea.

* * * * * * *

Q. And so those lines are stretched there to keep anybody away from underneath those buckets, that is the purpose of the line, isn't it, that you have reference to?

A. Well, yes, that is one purpose.

Q. What other purpose?

A. I have been in boats where they were lying all night and wouldn't put the hatches, they wouldn't put the hatches on at night time but they would stretch a line across some place to head people off.

Q. What do you mean, what kind of boats were those?

A. Lumber boats chiefly.

Q. That is wooden boats, old fashioned wooden boats?

A. Yes, sir, no electric lights.

109 Q. They don't have any electric lights?

A. No, sir.

Q. Have nothing but the old fashioned lanterns?

A. That is right.

(Adjournment.)

Plaintiff called as witness Dr. T. F. SOUTHWICK, who testified to the injuries and treatment.

Plaintiff called as witness OLIVER JORGENS, who testified his business was a seaman; that he had been sailing the Great Lakes for 24 years on vessels of all kinds, including bulk freighters; that he had been on quite a few steel steamers.

* * * * * * *

Q. It there a custom with regard to covering the hatches?
A. It has been customary——
Q. Just answer yes or no, is there a custom?
A. Yes, sir.
Q. Now, what is that custom?
A. Why, if the captain expects to get a load during the day, say along in the afternoon, he will take the hatches off a couple of hours ahead of time. If anything breaks down on the dock so that he can't get his load at that time, you understand, and not before the next morning, he will order the hatches put on again, but if he expects to get a load during the evening or some time during
110 the night, he will sometimes put them on and other times again he will leave them open, but with a light around them.
Q. When a vessel is lying at a dock at night and not engaged in taking on cargo or discharging cargo, what is done——

The Court: Is there any custom?

Q. What, if any, custom is there with regard to the covering of the hatches or of protecting them, if uncovered?
A. Sure, there is a custom. There is a custom in all the boats. I have not been on one boat yet in the time I have been on the lakes when the haches was left open at night without a light around them or a life line around there or a chain around them. It will be one thing or the other; either put them on and close them up entirely or else put a light around them.
Q. How long does it take to cover one of these hatches by the machinery, where they have collapsible steel hatches?
A. Well, it takes about a half an hour.
Q. I am talking about one hatch?
A. One hatch?
Q. Yes?
A. Oh, that only takes about three or four minutes.
Q. How long would it take to uncover all the hatches on a 23 hatch boat?
A. About a half an hour.

* * * * * * *

He further testified that boats like the Ohl carry two watch-
111 men, one on at a time; that their duties are to watch the boat and see that nothing is stolen off the boat, to see that she does not take fire, and to look after the lights and keep the lights burning on the deck at night.

To further maintain the issues, plaintiff introduced himself as witness.

Direct examination.

By Mr. Eichelberger:

Q. State your name to the jury?
A. My name is John J. Wattawa.
Q. How old are you, Mr. Wattawa?
A. I was 23 years old the 9th of August.
Q. Where is your home?
A. My home is in Manitowoc County, State of Wisconsin.
Q. Where do you live there, on a farm?
A. Yes, on a farm.
Q. Were you born up there?
A. I was born up there, yes, sir.
Q. And what work did you do up until you were 23 years old?
A. What work did I do?
Q. Yes, what was your business?
A. I was working out in a machine shop, working out in the city of Manitowoc.
Q. Have you worked on a farm?
A. I worked on a farm, yes, before 21.
Q. When did you first start to sail on a boat?
A. Well, 1910 I made a little trip on the John P. Reiss from Green Bay to Duluth and from there I went out to Ashtabula
112 and then back to Escanaba.
Q. On what boat was that?
A. John P. Reiss.
Q. Had you sailed any since then until you went on the deck of the Edwin N. Ohl?
A. No, sir.
Q. Where did you ship on the Ohl?
A. Manitowoc City.
Q. What was the boat doing there?
A. Unloading coal.
Q. Who hired you to work there?
A. The mate.
Q. Who was the mate?
A. I can't exactly tell you the name because I don't know his name.
Q. Did you tell the mate how much experience you had had aboard a boat or did he ask you?
A. How do you mean?
Q. What conversation did you have with the mate when you engaged to work on the Ohl?
The Court: Did you tell him how often you sailed, how long you had been on the lakes?
The Witness: When I came up to the boat the first thing, when I was down in the boarding house there were three fellows came down there from the boat; they told me they quit the boat and I went

down there and I asked the mate, the second mate, I guess it was, I asked him if I could go to work and he said, no. The first mate went up town, he said, to look for some men, so I went down and afterwards I came back and he gave me a job.

Q. What conversation did you have with the first mate?

A. What do you mean by conversation?

The Court: Talk.

113 Q. What talk did you have with him, what did he say to you and what did you say to him?

A. The mate, well, I asked the mate for work and he said, yes, that I could go to work after the other mate comes up, the first mate.

Q. Well, what talk did you have with the first mate when he came up there?

A. Why, I asked him for work.

Q. What did he say to you?

A. He said yes, that I could get a job.

Q. Did he ask you if you had worked before on a boat?

A. Why, he asked me, yes, and I told him about that short trip what I had made.

Q. Did you tell him that was all the trip you made?

A. Yes, sir.

Q. And then he engaged you as a deck hand?

A. Yes, deck hand.

Q. When the boat left Manitowoc where did it go?

A. It left on Sunday morning and went up to the Soo, to the locks up to Superior.

Q. Superior?

A. Yes, sir.

Q. And what cargo did it get there?

A. Ore.

Q. Got iron ore at Superior?

A. Yes, sir.

Q. And where did it take the iron ore to?

A. To Ashtabula.

Q. Did you unload at Ashtabula?

A. Yes, sir.

Q. And from there you went where?

A. Sandusky.

Q. When did you arrive at Sandusky?

A. Sunday morning.

114 Q. What did they do Sunday?

A. Doing nothing.

Q. Did anything happen aboard the boat Sunday at all, no cargo taken on?

A. No, sir.

Q. The next day, what was done?

A. The next day was Labor Day, wasn't doing nothing again.

Q. Where were you the next day?

A. I went up town to see the parade.

Q. Then where did you go after you saw the parade?

A. Then I went back to the boat.
Q. Who went back with you, if anybody?
A. Me and my partner Joe, Joe Mraz, that got hurt with me.
Q. What language does Joe speak?
A. Bohemian language.
Q. Do you know how long Joe has been in this country?

Objected to.

Q. Who was aboard the boat when you came back?
A. Who was in the boat?
Q. Who was aboard besides you and Joe?
A. When I came back I didn't see nobody.
Q. Where was the crew that day?
A. I can't just tell you, but I know some of them were out to Cedar Point Labor Day.
Q. Now, the boat took no cargo on Monday?
A. No, sir.
Q. On Tuesday, what did you do all day?
A. On Tuesday we went, they sent us down into the boat to sweep the floor down below.
115 Q. And what is the fact as to whether you swept the floor?
A. Yes, sir, we swept part of it.
Q. When did you get through sweeping?
A. Oh, I can't just tell you, about between two and three o'clock in the afternoon.
Q. Then what did you do?
A. They called me up to pull some groceries up on the boat from the little boat.
Q. From the little supply boat?
A. Yes, sir.
Q. And you pulled those up with a line over the side?
A. Yes, sir.
Q. Then what did you do when you got through with that?
A. Then they rang the bell and we washed our faces, it was a quarter to six.
Q. After you washed up what did you do?
A. Went to supper.
Q. You remember how long you were in at supper?
A. I can't just tell you. About between a half an hour and a whole hour.
Q. This happened on Tuesday evening, the 2nd of September?
A. Yes, sir.
Q. What was the weather that day?
A. How?
Q. What was the weather that day, was it warm or what?
A. Oh, it was warm.
Q. After you got through supper, what did you do?
A. Went down in the room and sat down for a while and then we went up to the mail box on the corner.
Q. You say we, who was we?

A. Me and Joe, my partner.

116 Q. What did you go to the mail box for?

A. To send a card on home.

Q. To whom, to your family?

A. To my folks and my friends.

Q. Now, when you went back to wash your face, where is the washing place, is that aft of the boiler house?

A. Yes, sir that is right down next to the engine room, down below.

Q. Where were your sleeping quarters?

A. Down below in the same place.

Q. Right next to the engine room?

A. Yes, sir.

Q. Where is the place where you eat on the boat?

A. Above.

Q. Is that aft of the engine room or forward?

A. That is aft.

Q. So you were part of the crew that were quartered in the after end of the boat?

A. Yes, sir.

Q. And then the deck house for the mates and captain are up at the other end of the boat?

A. Yes, sir.

Q. Where does the watchman stay, up at the other end?

A. The watchman, I seen him all over the boat.

Q. You don't know where he sleeps?

A. Only I guess he sleeps up in front.

Q. Up forward?

A. Yes, sir.

Q. When you went in to wash up, did you notice, what, if anything, was being done with the hatches or hatch covers?

117 A. Yes, when we were pulling up the groceries there was some of the boys shutting up the hatches, shutting up the holds, covering up the holds.

Q. When did they stop, if you know?

A. When did they stop?

Q. Stop covering up the hatches?

A. Well, I can't tell you when they stopped covering the hatches, about five o'clock.

Q. When you went in to supper did you notice whether the hatch there by the engine house was closed or not?

A. Yes, that hatch was closed.

Q. Now, when you came out from sitting in your room to go to the mail box, was it dark or light outside?

A. It was dark.

Q. And how did you go ashore, how did you get off the boat?

A. Well, I walked right on the end where the engine room is and then I walked around, went aroun*t* the hatches and walked to the ladder and went down.

Q. Where was the ladder?

A. The ladder must have been around between 4 and 5 hatches.

Q. 4 and 5 hatches from where?
A. From the back end.
Q. From the boiler house aft?
A. Yes, sir.
Q. Did the ladder set on the dock?
A. Yes, sir, the ladder sat on the dock and it was on the boat.
Q. Was there any lantern on the ladder at the time you went ashore?
A. There was a little lantern.
Q. On the ladder?
A. On the ladder.
118 Q. Whereabouts was that on the ladder?
A. Just about even with the deck.
Q. Where was it hanging from, where did they fasten the lantern?
A. They fastened it on the end of the deck.
Q. Well, which way was it, on the outside of the boat?
A. On the outside of the boat.
Q. You say Mraz went with you up to the mail box?
A. Yes, sir.
Q. How long were you gone before you came back aboard the boat?
A. Between a half and three-quarters of an hour.
Q. When you came back, did Mraz come with you?
A. Yes, sir.
Q. Then where did you go when you came aboard the boat?
A. I went on the boat.
Q. Now, when you came up the ladder was the light burning at the ladder at that time?
A. That little lantern, yes.
Q. At the ladder?
A. Yes.
Q. Now, when you got on the deck what did you do?
A. I got on the deck and we sat down for awhile to rest. I smoked a pipe and he smoked a cigarette.
Q. Where did you sit down on the deck, where with reference to the ladder, how close to the ladder?
A. From the ladder it was about eight or nine feet or more than that.
Q. Well, what did you sit on?
A. They had such canvas to cover up the hatches and we sat on that.
119 Q. Did you sit on the hatch?
A. Yes, sir.
Q. The hatch you sat on, was that covered?
A. That was closed, yes.
Q. What did you do while you sat there?
A. We were looking at the dump where they was dumping that coal, how they raised them up and how they dumped them into the boat.
Q. You had never seen that before?

A. No, sir.
Q. That was where, across the slip?
A. Across the harbor or what you called it, right next to our boat, on the other side.
Q. Across what they call the slip or did you ever hear it called a slip?
A. I don't know what a slip is.
Q. Well, this boat was across the slip; you and Mraz watched them for a while?
A. Yes, sir.
Q. Now, the hatch you sat on you say was closed?
A. Yes, sir.
Q. How about the hatch in front of that, towards the front of the boat?
A. That was closed.
Q. How about the hatch back of that?
A. That was closed, too.
Q. Now, after you sat there for a while, what did you and Mraz do?
A. We smoked.
Q. After you got through smoking you started back to the room to go to bed?
A. To the room, yes, sir.
Q. Was the entrance to the room on the same side of the boat as the ladder was on or was it on the other side of the boat?
120 A. The room was on the other side.
Q. Now, tell the jury how you started to cross the deck to your room.
A. Well, I went to work and I hit my partner just like this (indicating), and I said, "Joe, let's go into the room, it is getting cold." So that we started and walked across the hatch about eight or nine steps or so; when we walked over we never noticed that hole, I didn't see the hatch hole was open, and we dropped in.
Q. How many hatches did you cross before you stepped into this open one?
A. One.
Q. Did you count whether it was one?
A. I knew just the way I passed them, because the hatches is a little higher and there is a kind of an alley in between them.
Q. Now, what is the fact as to whether there was any light on the deck at the end of this hatch?
A. No, sir, there was no lights on the boat.
Q. Was there any light burning down in the hold of this boat?
A. No, sir.
Q. State what the condition was as to the deck at the time that you started to go to bed, as to being light or dark?
A. What it was?
Q. What was the condition, was it light or dark on the deck?
A. It was dark on the deck.
Q. State whether or not you saw this open hatch?
A. No, sir, I didn't see it.

Q. What was the last work you saw the crew doing before you washed up?

121 A. Some of them I seen shutting up them hatches and some of us were pulling up the groceries.

* * * * * * *

On cross-examination he testified he was 23 years of age; that he lived in Manitowoc City and previous to that in Manitowoc County; that before he shipped on the Ohl he had, when twenty years of age, taken a trip on the steamer John P. Reiss, which was the same type of a vessel as the Ohl; that on her he was a deck hand and coal passer; that he had seen them pull off the hatches on the Reiss.

* * * * * * *

Q. Now, in 1913 you came down to Manitowoc and shipped, is that right?

A. Yes, sir.

Q. Then you got on this vessel, the Edwin N. Ohl, is that so?

A. Yes, sir.

Q. What was it the mate asked you, whether you had ever been a deck hand before?

A. He asked me if I sailed before and I told him about the short trip I made.

Q. What did you tell him?

A. I told him that I worked on the John P. Reiss.

Q. As a deck hand?

A. Yes, sir.

Q. Now, on the Ohl, when you got on the Ohl where did you go from Manitowoc?

A. She went up to Superior.

Q. What was she doing in Manitowoc while you were there?

A. Unloading coal.

Q. Did you ship before she got through unloading coal?

A. Oh, I shipped on the boat. How do you mean, if I got hired on the boat?

122 Q. Yes.

A. Yes, sir, I did.

Q. Who helped put on the hatches after she got her coal off?

A. Me and Joe did.

Q. Then you went from Manitowoc to where?

A. To Superior.

Q. When you got to Superior who took off the hatches?

A. Us fellows again, all the crew.

Q. You and Joe and the rest of them?

A. And the rest of them.

Q. Now, when she got her load of ore up there, who was it put on the hatch covers? After you got your load of ore, you and Joe and the rest of you put on the hatch covers, didn't you?

A. Yes, sir.

Q. Then you came down to Ashtabula, did you?

A. Yes, sir.

Q. When you got to Ashtabula and before you unloaded, who took the hatch covers off, you and Joe and the rest of them?

A. All the crew, yes.

Q. You and Joe and the rest of them; now, when you got through unloading at Ashtabula, who put on the hatch covers, you and Joe and the rest of them?

A. All the crew again.

Q. Now then, you went from Ashtabula to where?

A. Sandusky.

Q. And when you got to Sandusky, what time of the day was it?

A. Sunday morning.

Q. Well, about what time?

A. I can't tell you what time, I would say between five and seven.

Q. Did you do anything on the vessel that day?

A. No, sir, Sunday morning?

123 Q. Yes.

A. Well, we helped tie her up to the dock.

Q. Anything else?

A. No, sir.

Q. Now, on Sunday night did you stay on the vessel?

A. Sunday night, yes, sir.

Q. How?

A. Yes, sir.

Q. You didn't get off the vessel Sunday night, go up town Sunday night?

A. No, sir.

Q. Now, on Monday what did you do?

A. Monday we stayed on the boat in the forenoon and in the afternoon it was Labor Day and we went down town to see the parade.

Q. Now, that is what I want to know; now, when you got off your vessel on Labor Day afternoon to go up and see this parade, did you go as far as the court house?

A. Yes, we seen the court house.

Q. Went up that far?

A. Yes, sir.

Q. How long were you gone up there that afternoon?

A. About two or three hours.

Q. Did you stand on the street all the time?

A. Why, we went up, I went up to the drug store and bought me a razor by the court house and we bought some cards and got some stamps and wrote the cards and sent them down home.

Q. Now then, you went back to your boat Monday afternoon?

A. Yes, sir.

Q. About what time?

A. Between four and five.

Q. You stayed on the boat that night?

A. Yes, sir.

124 Q. Then on Tuesday what did you do?

A. Tuesday morning we started to help sweep the floor in the boat.

Q. You and Joe?
A. Me and Joe.
Q. And the rest of the crew?
A. And some of the other boys.
Q. Now, did you take the hatches off before you started to sweep the floor?
A. Yes, sir.
Q. What time did you start to sweep the floor?
A. In the morning.
Q. Who was it helped pull the hatch covers off, you and Joe?
A. Me and Joe and some of the other crew.
Q. How long were you sweeping the floor?
A. Oh, about, well, it took us quite a while.
Q. When did you quit?
A. Well, we got through some time between, after dinner some time.
Q. Well, what time did you quit on that day, on Tuesday?
A. About three o'clock or four.
Q. Then what did you do after you got through sweeping down below there?
A. Then I went up to help them other fellows pull the groceries up.
Q. What time was that?
A. Between four and five.
Q. And what else did you do after that?
A. Then when we pulled the groceries up they rang the first bell and we went and washed up, washed our faces.
Q. Where did you pull the groceries up?
A. Up in the ice box.
125 Q. I know, which side of the boat was it?
A. On that side, right hand side.
Q. Which side of the ship was lying next to the dock?
A. Which side?
Q. Yes.
A. The left side.
Q. So you pulled up your groceries on the water side?
A. Yes, sir.
Q. And how far towards the front part of the ship were you when you were pulling up those groceries?
A. How far?
Q. Yes.
A. How do you mean, how far?
Q. I will ask you how near to the stern of the vessel were you when you were pulling up those groceries?
A. Stern, what stern do you mean, the rope or what?
Q. The stern of this vessel, the Ohl, how near to it were you; you know where the boiler house was, don't you?
A. Yes, sir.
Q. How near the boiler house were you?
A. We was right next to it.
Q. Right next to the boiler house?

A. Yes, sir.

Q. Now, when you got your groceries in and started down to wash up, did you go down in that part of the ship where the boiler house was?

A. Yes, sir.

Q. And got your supper?

A. Got our supper right on deck in the cook's room.

Q. What time did you get through supper, about?

A. Around seven o'clock.

126 Q. Now then, what did you do then?

A. We went down to the mail box.

Q. Now, you went down to the mail box up town?

A. Well, I didn't go right up town, I went about between three and four blocks, it was up at the corner there, on the corner by the mail box.

Q. That was three or four blocks from the vessel?

A. About that.

Q. And that was some time after seven o'clock in the evening?

A. Something like that.

Q. Was it dark when you left the vessel to go to this mail box?

A. Yes, sir, it was a little dark.

Q. And you used the ladder to get off the vessel onto the dock?

A. How?

Q. You used the ladder to get off of the vessel onto the dock?

A. Used the ladder, yes, sir, went down on the ladder.

Q. At the time you went down the ladder there was a light at the top of the ladder?

A. When we went down, no, sir, there was no light

Q. There was no light when you went off the vessel on the ladder?

A. No, sir, not when we went off.

Q. Now, how far from this boiler house was this ladder?

A. This ladder was between, well, we will say, against the fourth or fifth hatch from the back end, from the engine room.

Q. Now, you have got it right, have you, that this ladder was at 4 or 5 hatch from this boiler house, going forward on the ship?

A. Yes, sir, the ladder was right against, we will say here
127 is four and here is five, here is the ladder; the ladder was right in here (indicating).

Q. Where this boiler house was was where you got your supper, is that right?

A. Yes, sir.

Q. Then you wanted to go to this mail box, that is right, isn't it?

A. Yes, sir.

Q. So you went to the ladder, didn't you?

A. Yes, sir.

Q. Now, the ladder was up forward of this boiler house, wasn't it?

A. Up forward?

Q. Yes.

A. No, sir; from the back end.

Q. Well, that is from the back end; you had to go from the boiler house past how many hatches to get to this ladder?

A. About four or five.

Q. Now, which side of the ship did you go to when you went to that ladder, on the side next to the dock or the other side?

A. I started from the other side and I walked around the engine room and I walked around, there was a kind—two ropes, kind of a fence around the boat, and I walked around that and started to the ladder.

Q. And in going from the place where you walked from the engine room to this ladder, you passed four or five hatches?

A. Yes, sir.

Q. Which hatch was it that you fell into, beginning from the boiler house?

A. It must have been the 21st or 22nd.

Q. No, no, but from the boiler house, which hatch was it you fell into?

A. Which hatch?

128 Q. Yes.

A. I can't tell you, I just know when I walked up and I seen the ladder against 4 or 5.

Q. What is that?

A. I say I can't tell just what hatch we fell in.

Q. Let us see if we can figure; when you came back, you came up the same ladder, didn't you?

A. Yes, sir.

Q. And you went back towards the boiler house or started back towards the boiler house, didn't you?

A. Yes, I went towards my room.

Q. And your room was in the part of the ship where the boiler house was, that is right, isn't it?

A. Yes, sir.

Q. Now, the ladder was at the same place when you went up as it was when you went down, wasn't it?

A. Yes.

Q. Now, tell me again or tell the jury again, rather, just how you went to this ladder when you left the place where the boiler house was to go up town?

A. Well, I went on deck from the room.

Q. Which side of the boat did you go on deck from, the dock side or the water side?

A. The water side.

Q. Then you came around?

A. Came around the room.

Q. Right next to the boiler house?

A. Right around the boiler house.

Q. And crossed over to that part of the boat that was next to the dock, is that right?

A. Yes, sir.

129 Q. Then you walked right up to the ladder, did you?

A. Yes, sir, then I walked up to the ladder.

Q. On that side of the boat which was next to the dock?
A. On that side of the boat which was next to the dock, yes sir.
Q. And then you went down to the ladder?
A. Then went down to the ladder.
Q. Then you went up town?
A. Then I went up to that mail box.
Q. Now, when you got to the mail box what did you do, stick in your cards and then where did you go?
A. Then we stopped in that saloon there.
Q. That what?
A. That saloon there.
Q. That saloon there; what drinks did you have in that saloon?
A. Two drinks.
Q. You took two drinks?
A. Yes, sir.
Q. Did Joe take any?
A. Joe took two.
Q. What were they?
A. Beer.
Q. What else did you buy in there?
A. Then Joe bought a bottle.
Q. A bottle of what, a bottle of whiskey, didn't he.
A. Yes, sir.
Q. And you took that back to the vessel, didn't you?
A. Yes, sir, he took that with him.
Q. Now, when you started back to the vessel and got to the dock, you went up this ladder?
A. Yes, sir.
Q. And at the top of that ladder you found a light, didn't you, kerosene lantern?
A. Kerosene lamp right against the deck.
130 Q. About even with the deck, you said?
A. Yes, sir.
Q. And when you got on the deck you and Joe sat down to take a rest, I understood you to say?
A. Yes, sir, we sat down.
Q. Did you take your shoes off?
A. No, sir.
Q. At any time while you were sitting there?
A. No, sir.
Q. When you sat there and took a rest, you smoked what?
A. Smoked a pipe.
Q. And Joe smoked something else, a cigarette?
A. A cigarette, yes, sir.
Q. And how long did you sit there?
A. I can't tell you just how long, between a half or a whole hour.
Q. Now, while you were there you took a drink out of this bottle, too, didn't you?
A. No, sir.
Q. You didn't take any drink at all out of the bottle?

A. No, sir.
Q. Well, did Joe keep the bottle in his pocket?
A. Yes, sir, he kept the bottle in his pocket.
Q. Now, did you and he get up from that deck at any time?
A. How?
Q. Did you and he get up from that deck, from this hatch, at any time before you started back to your room?
A. No, sir, we were sitting down there, looking out there how they are dumping that coal down there.
Q. You were sitting there, looking to see how they were dumping the coal, where?
131 A. On the other boat, into the other boat, how they dumped it down, how they dumped the cars.
Q. How far away was that other boat?
A. Right across.
Q. How could you see over there?
A. I seen because they had lights there.
Q. Where were the lights over there?
A. On the machinery where they had the dumpers?
Q. Lights on the boat, too?
A. On the other boat?
Q. Yes?
A. They had some lights there.
Q. You saw those lights, didn't you, in the other boat?
A. Yes, sir.
Q. Now, what kind of lights were there that they had up on this machinery, big arc lights, weren't they, electric lights?
A. Yes.
Q. How many of them did they have strung along the dock there?
A. I can't tell you how many.
Q. They were right opposite where you were, weren't they, on the other side of the slip?
A. Yes, sir, kind of that way.
Q. About how far away were you?
A. How far?
Q. Yes?
A. About 400 feet, 400 or 500 feet.
Q. Just across the slip, weren't they?
A. Not quite across.
Q. Well, this car dump was on the dock on the other side of this slip, wasn't it?
A. Yes, sir.
Q. The same slip you were in?
A. Yes, sir.
Q. Who sat down on this hatch cover first, you or Joe;
132 after you came back from up town on that night?
A. I can't tell you just who did.
Q. Both sit down together at the time?
A. I sat down first.

Q. Now, how far was that hatch cover that you sat upon from this hatch that you fell into?

A. How far?

Q. Yes?

A. Eight or nine feet, maybe ten.

Q. Was the hatch you fell into nearer this boiler house than the hatch cover you sat down on, you and Joe, that night?

A. Yes, sir.

Q. Before you sat down on the hatch cover, how did you know that the cover was on, did you see it?

A. Well, I seen the first one when I started, that was covered.

Q. You saw that was covered?

A. Yes, sir.

Q. You saw it with your eyes?

A. When I started next to the engine room, the last hatch to the engine room.

Q. I am talking about when you came back from up town where you had mailed your letters; I understood you to say you came up the ladder and went and sat down on a hatch cover, is that right?

A. Yes, sir.

Q. Before you sat on the hatch cover did you see the cover was on the hatch?

A. Before I sat on the hatch cover?

Q. Yes, did you see the cover was on the hatch?

A. I seen the hatch behind us, that was covered and the one we sat on and the one in front.

133 Q. You saw those were covered?

A. Yes, sir.

Q. Standing up did you see them?

A. Just at the time I came in, yes, sir, when we was standing up.

Q. In other words, you walked up from the ladder and walked on the deck and saw those three hatch covers were on?

A. Yes, sir, that is all I could see, too.

Q. But you could see those?

A. I could see them.

Q. Now, how many hatches back of the cover you sat on was the hatch you fell into?

A. How many hatches?

Q. Yes, about how many hatches?

A. It was the second one from the one we sat on.

Q. Where were you standing when you saw the hatch cover, back in front of the hatch cover you sat on?

A. A little ways from the ladder where the hatch was where we sat down.

Q. That was before you sat down and that was a little ways from this ladder, the hatch cover you sat on?

A. Yes, sir.

Q. And you saw the hatch cover next to it and forward of it was on, didn't you?

A. Yes, sir.

Q. And you saw the hatch cover back of the one you sat down on was on, you saw that, didn't you?

A. Yes, sir.

Q. That is just as you came up from the ladder and got on the deck of the vessel, that is so, isn't it, when you came up to
134 the ladder and on the deck of the vessel, those hatch covers were on, those three?

A. Yes, sir, them three.

Q. Now, do I understand you to say it was dark on the Edwin N. Ohl?

A. Yes, sir, it was dark.

Q. Do I understand you to say there was no lights on the Edwin N. Ohl anywhere?

A. Except that lantern.

Q. No lights except that lantern at the ladder is that right?

A. At what?

Q. At the ladder?

A. At the ladder, yes, that was the only light I seen.

Q. And that was the only light you saw on that vessel that night?

A. Yes, sir.

Q. You say you saw the watchman there, didn't you?

A. I seen the watchman in the day time when we was working with him, yes.

Q. You saw the watchman all over the boat, didn't you?

A. When we were working, yes, sir, he was working with us.

Q. Did you see anybody on the vessel at all that night after you came back from mailing your letters?

A. I seen somebody when we sat down, I don't know whether the captain or one of the mates. I know there was a man walking with a woman right around the ladder.

Q. How near to you did you see somebody walking with a woman?

A. Just about from here to you.

135 Q. You saw them, did you?

A. Yes, sir, I seen the man.

Q. What else did you see?

A. Then we seen the boat, how they were working at the boat.

Q. That is all you did see on that boat that night?

A. Why, yes.

Q. You didn't see any men about?

A. No, sir, it was dark.

Q. And didn't see any lights about?

A. No, sir.

Q. See any lights on the boiler house?

A. What?

Q. Any lights on the boiler house?

A. Well, I wasn't in the boiler house.

Q. No, but on the front of the boiler house?

A. No, sir.

Q. Well, while you were on that vessel, do you know whether she had any lights on her at all?

A. No, sir, except that little lantern what I am telling you about.

Q. While you were on the vessel on your trip from Manitowoc to Duluth and down to Ashtabula and back to Sandusky, do you know whether there was any lights on the vessel?

A. Sure they had lights.

Q. What kind of lights did they have, my boy?

A. They had those electric lights.

Q. Incandescent lights?

A. What?

Q. Incandescent lights?

A. They had electric lights, had kind of a light like there is in the court house, only a different globe over them.

136 Q. Now, did you see those lights on the front of the pilot house?

A. When they were lit, yes.

Q. And they had lights down in the hold, electric lights, didn't they?

A. Below?

Q. Yes.

A. Had a kind of light that shined down on the end, there was a kind of a light hanging down on the other side, too.

Q. Those were electric lights?

A. They looked like it.

Q. You had seen them burning some time during the trip?

A. Yes, when they load and unload they were burning.

Q. Where else did she carry lights that you saw that were burning on this trip?

A. When we were on the lake?

Q. Where did she carry lights that you saw that were burning on this trip?

A. Where else?

Q. Yes.

A. Out on the lake.

Q. Now, when the hatch covers were off were they pulled up or how did they lay?

A. You know they kind of slide them one on top of the other.

Q. They made a pile of hatch covers, didn't they?

A. When they come to the end they would be one on top of the other.

Q. In other words, the top of that pile of hatch covers, the covers were higher than the deck, weren't they?

A. Why sure.

Q. And they were right along the path along side of the vessel where you could walk, weren't they?

A. Why, yes, they were slid out, kind of arms, hooks,

137 they hang down like this (indicating), and they slide them on top of that.

Q. When the hatch covers were on there was a space between the end of the hatch and the side of the vessel where people walk or where the men walk, wasn't there?

A. Yes, sir.

Q. Now, when the hatch covers were off and piled up as you have

said, they were right in that space where the men walk, weren't they?

A. Yes, sir.

Q. And there was plenty of room to walk outside of them, between them and the side of the vessel?

A. There was room, yes, for a man to walk; one man, though, there could be two fellows walking on the top of them.

Q. But one man could go around the hatch covers all right?

A. Yes, sir, but he had to be awful careful, though.

Q. By the way, when you and Joe started back there, was he ahead of you?

A. What did you say?

Q. When you and Joe started back there, was he ahead of you or you ahead of Joe or did you walk together?

A. Where did you mean, on the ladder?

Q. No, when you started back to get to your quarters?

A. We walked together.

Q. Where was the stairway that lead down to your room, which side of the vessel was that on?

A. That was right down to the engine room, part of the engine room.

138 Q. No, the stairway that led down to your room, which side of the vessel was it on, the water side or dock side?

A. The water side.

Q. That led down to your room?

A. Yes, sir.

Q. The way to go down, you would have to go through the engine room, wouldn't you, to get to your room on that side?

A. To where our room was?

Q. Yes.

A. When we went down them stairs that went down from the water side. We went down and walked across to the room.

Q. I understand that; now, the stairs that led down into your room—you slept below deck, didn't you?

A. Yes, sir, but them stairs didn't go in our room; our room was a little farther on the other side.

Q. Those stairs led down to the deck hands' quarters on the dock side of the vessel?

A. On the dock side of the vessel, yes, sir.

Q. Now, when you say there was a kerosene lamp at the top of that ladder, wasn't it the same kind of a lamp that you have seen around vessels?

A. Regular lantern what they use to carry around, when the watchman was walking around I seen him a couple of times carrying that lantern, just a common lantern.

Q. What kind of a lantern was at the top of this ladder?

A. That was a common lantern.

139 Redirect examination:

By Mr. Eichelberger:

Q. How many mates did this boat have on her?
A. Two.
Q. And who had charge of the carge, putting in and out the cargo, which mate?
A. I can't tell you which mate.
Q. Who gave you your orders, what man ordered you to do things there?
A. The mate and the watchman.
Q. The first mate has charge, of course, in port?
A. Anyone that comes around.
Q. Did you see the mate at different times there, one of the mates or the captain going up and down the deck?
A. When?
Q. Any time?
A. Why, sure, I seen the captain and mate.
Q. How did they walk?
A. In that place—when the mate was with us, he told us what to do.
Q. Do you know how thick these steel hatch covers are?
A. About a half an inch thick, the covers, I mean.
Q. When you were employed or any time after that, did any of the officers say anything to you concerning where you should walk on the deck?
A. No, sir.
Q. At any time did any of the officers tell you not to use the hatches to walk over?
A. No, sir.
The Court: How wide is that passageway between the hatches and the side of the boat, between the gunwales, what is the
140 width from the side of the boat over to the hatch?
The Witness: You mean to the hatch, about four feet, I ain't very sure, though.
Q. This coal machine that you watched there, down the slip about 400 feet away, was loading soft coal into the boat, was it?
A. I don't know whether hard or soft coal, I know when they dumped it in there was dust, the dust was flying around.
Q. How did they dump them, tell the jury what they did with this car?
A. Well, they run the car onto a kind of a platform and they raised her up with steam, I suppose, and then there was a kind of what you call these—they dumped the car right over.

* * * * * * *

To further maintain the issues, plaintiff introduced JOSEPH MRAZ, who testified that he was 23 years old and had never worked on a vessel before he worked on the Ohl.

Q. In what place were you when the accident happened here to John Wattawa, in what place?

A. Sandusky, Ohio.

Q. About what time in the evening did you and John go off the boat?

A. I don't know exactly, but I think it was between eight and nine o'clock that evening.

Q. And when you came up on the boat, how did you come up on the boat?

A. I walked on the ladder.

141 Q. And where was this ladder?

A. It was on the middle of the vessel somewheres around.

Q. And after you got up on the ladder, where did you go?

A. I sat down on a hatch.

Q. Who was with you?

A. John Wattawa.

Q. How long did you sit there?

A. I can't exactly tell you, as I didn't have any time piece with me, but when this happened it was around nine o'clock.

Q. And after you had been sitting on the hatch for a while, what did you do, if anything?

A. We were sitting there, John was smoking a pipe and I was smoking a cigarette and we were watching the boat next to ours when they were dumping coal.

Q. Then what did you do after that?

A. Then John said, "Let's go to the room and lay down."

Q. Could you talk to John?

A. Yes, I could, as he talks Bohemian language.

Q. And after you decided to go to bed, what did you do?

A. I fell down.

Q. How far did you walk before you fell down?

A. I made about five or more steps, but I think I crossed over two hatches.

Q. What light, if any, was there at the ends of this hatch where you fell?

A. There was no light whatsoever around there.

Q. Was there any light inside of the boat?

A. I couldn't see any.

Q. How was it on the boat, on top of the boat, as to being light or dark?

A. There was no light or I would have seen.

142 Q. What light, if any, was there on the ladder?

A. A common, ordinary lamp there on top of the ladder.

Q. What part of the ladder did this light hang on?

A. About where the fourth step is, near the step, it was hanging.

Q. Where was it, with reference to the deck of the boat?

A. It was hanging on the ladder.

Q. But where with reference to the deck of the boat, do you know what the deck of the boat is?

A. It was down below the deck.

Q. As you walked back from this place where you were sitting towards the place where you were going to sleep, what if anything, now, did you see there?

A. I didn't see anything.

Q. Did you know whether the hatch was open or not?
A. No, I didn't know it was open, I saw them closed up. I know that they were all closed around where I was sitting.

Cross-examination.

By Mr. Holding:

Q. How did you notice that they were all closed around where you were sitting?
A. As I was sitting there, I looked around, one in front of me was closed and one in back of me was closed.
Q. As you sat there, how far from the one in front of you were you?
A. I could step over to the one that was in front.
Q. Now, the one in back of you was about 12 feet from you?
A. I only know that I made about five steps before I fell.
143 Q. That is all you can tell about the distance?
A. That is all I know and I don't know any more. After I fell in there I couldn't tell what happened.
Q. As you sat on the hatch smoking with John, which side of the hatch did you sit on, the forward side or the back side?
A. We both sat together.
Q. Well, did you sit on the forward side of the hatch or the back side of the hatch?
A. More to the center of the hatch.
Q. On the end?
A. No, it was a little west from the edge of it.
Q. Where did you have your feet?
A. I had my feet between the two hatches.
Q. Now, which side of the hatch were you on, the side towards the front of the boat or the side towards the back of the boat?
A. I don't recall as to whether it was towards the front or towards the back.
Q. Now, who did you see when you got on the boat after you came from up town?
A. I didn't see anyone.
Q. Did you see a man or a woman there?
A. I didn't see anyone.
Q. How many saloons did you go into up town?
A. I was in one, but the name of it I am not able to tell you.
Q. How many drinks did you have in there?
A. John and I, we both had beer.
Q. How many?
A. Each of us had two.
144 Q. What did you buy in that saloon?
A. I bought the beer.
Q. What else?
A. After, we bought the whiskey together for us.
Q. How many drinks of whiskey did you get in there that night?
A. No whiskey, we bought a little bottle of whiskey in case we would get sick on the trip and we took it along with us but didn't touch any of it.

Q. How big was the bottle?
A. A very small bottle, it was only 15 cents' worth.
Q. Now, what became of the bottle?
A. After I fell in that place, why, the bottle was broken.
Q. When you went down into the hold the bottle was in your pocket, was it?
A. The bottle was full, in my pocket and when I fell it broke.
Q. I don't know whether I asked you or not, how long did you and John stay out there on that hatch cover that night?
A. I couldn't tell you as to how long we stayed there, I know it was between 8 and 9 o'clock that evening.
Q. No, but how long did you stay there on the hatch cover?
A. It was quite a little while.
Q. Well, was it an hour?
A. I can't tell you, I had no watch.

Plaintiff introduced GEORGE J. DEAN as a witness, who testified he was a lieutenant of police in Sandusky.

145 Q. On the 2nd of September, 1913, what connection did you have with the police department of Sandusky?
A. Patrolman.
Q. Do you remember being called to the Steamer Edwin N. Ohl on the evening of September 2nd?
A. Yes, sir.
Q. About what hour of the evening did you get there?
A. About 9:30.
Q. When you were called on, by whom were you called?
A. I don't know who called us, they called from the Pennsylvania docks, telephoned to come with the wagon over there, that there were two men hurt.
Q. Did you go right over?
A. Yes, sir.
Q. When you went aboard the Ohl, how did you go aboard?
A. Up a ladder.
Q. What, if any, light was there on the ladder at that time?
A. No light.
Q. What did you do after you got on the deck
A. Why, they told us there was two men fell in the hold.
Q. What did you do when you went back along the deck, how did you go back?
A. A man had a lantern.
Q. Did you follow him?
A. Yes, sir.
Q. Where did you find these two men?
A. Lying along side of the hatch, I think it was.
Q. Was the hatch open, do you know?
A. Yes, sir.
Q. What light was there on the deck at that time?

146 To which question the defendant objected, which objection was overruled by the Court, to which ruling of the Court the defendant then and there duly excepted.

A. Only a lantern in the man's hand.
Q. How many lanterns were there?
A. I don't know, I only seen one I remember of.
Q. And a man was carrying that?
A. Yes, sir.
Q. Was there any other light on the deck of that boat?
A. I didn't notice any.
Q. Did you look down in the open hatch?
A. I looked down with a search light.
Q. With your search light?
A. Yes, sir.
Q. Was there any light in the hold of that boat at all?

To which question the defendant objected, which objection was overruled by the Court, to which ruling of the Court the defendant then and there duly excepted.

A. I didn't see any.
Q. State whether it was dark or light in the hold of that boat?
A. Dark.
Q. Were these men lying at the end of the hatch which was open?
A. Lying along side of the hatch, I think.
Q. What were the condition of the hatches around there as to being open or closed?
A. Well, I couldn't say that.
Q. Well, was the hatch next to this hatch open or closed?
A. I wouldn't say that either.
147 Q. Could you see anything around the deck there when you came aboard, except by the light of this lantern?
A. No, it was dark.
Q. Do you know who was carrying the lantern?
A. I do not.

On cross-examination he testified:

* * * * * * *

Q. Now, Mr. Dean, where were you when you got this telephone message?
A. At the station.
Q. And how long had those men been lying on the deck at the time you got this telephone message?
A. I couldn't say that.
Q. And how far was the station from the boat?
A. Well, it is over a mile, I think.
Q. And when you got the message what did you do?
A. Took the wagon and went out there.
Q. What kind of a wagon did you have over in Sandusky?
A. Patrol wagon.
Q. Horse and wagon?
A. We did then, yes.
Q. How far was it over there, would you say?
A. A good mile, anyway.
Q. When you got there, how many boats were in that slip.

A. I don't know how many.
Q. Was there more than one?
A. I think there was, yes, sir.
Q. How many were there?
A. I don't know.
Q. Any light on any other boat in the slip?
A. I couldn't say that.
Q. Were any lights around there at all?
A. On the docks.
148 Q. What kind of lights were on the docks when you got there?
A. Arc lights.
Q. How many arc lights?
A. I don't know how many.
Q. How far away from this boat?
A. Well, across the track, I think, I don't know how far exactly myself, I couldn't say.

* * * * * * *

Plaintiff also introduced witness J. C. PERRY, who said he was patrolman in Sandusky.

Q. About what time of the night did you get that call?
A. I should judge about 9:30.
Q. Where were you at that time?
A. At the station house.
Q. What did you do upon receiving that call?
A. Well, there was two of us there, Lieutenant Dean and myself, and the call came in at 9:30 and we jumped into the auto patrol and went out to the dock.
Q. And how long did it take you to get to the dock?
A. It wasn't over five minutes.
Q. When you got to the dock, who was the first person you saw there?
A. Well, I don't know who the man was, but some man was at the track and took us back as far as the boat.
Q. And how did you get aboard the boat?
A. Somebody standing on top with a lantern directed us to the ladder and we went up on the deck of the boat.
149 Q. When you got up on the boat what, if any, lights were there on the deck?

To which question the defendant objected, which objection was overruled by the Court, to which ruling of the Court the defendant then and there duly excepted.

A. Well, there was a man standing at the top of the ladder there with a lantern in his hand.
Q. Was there any other light besides that?
A. Not that I seen.
Q. Did you see any other lantern except this one?
A. No, that is about the only one I seen.
Q. Where did the man with the lantern go then?

A. He took us back. We got up towards the front when we met him and we walked backward from the dock with a lantern. I had my little hand light out to find my way back, I was in the rear.

Q. Lieutenant Dean was in front of you?

A. Yes, sir.

Q. And the man with the lantern was in front of him?

A. Yes, sir.

Q. And then you did what?

A. I was in the back with my hand light.

Q. What is a hand light?

A. A little search light.

Q. Why did you have that out?

A. It was dark, I took precautions so I wouldn't fall into anything myself, I guess.

Q. When you got back aft, what did you see?

A. Well, we bumped into the two men that was laying there.

150 Q. Lying there on the deck?

A. Yes sir.

Q. Were they lying near the hatch?

A. Along side of it, yes, sir.

Q. Was that hatch open or closed?

A. Open.

Q. How many hatches had you to pass to go back there?

A. Well, I don't know, I couldn't exactly say that.

Q. Were those hatches you passed open or closed?

A. I didn't see until we got to this one.

Q. Now, was there any light of any kind at that hatch?

A. No, only the light we had. The man that had the lantern in his hand and the one I had.

Q. Did you look down into the hold?

A. Yes, I looked down with my light.

Q. Was there any light?

Mr. Holding: This all goes in under exception?

The Court: Yes, sir.

Q. Was there any light burning in the hold?

A. I didn't see, I just threw the light out horizontal to see about the distance.

Q. Was it light or dark in this hold?

A. It was dark.

Q. Could you see any distance without your hand light?

A. No, you couldn't see the bottom.

Q. Did you find out who those two men were who were lying there?

A. They held the light down, we wrote their names down, where they were from and all that, before we left the boat.

Q. What light?

A. The lantern.

151 Q. Did you see any electric light burning on the deck?

A. I didn't see any.

Q. Was there any burning?
A. Not that I know of, there wasn't around where we were.
Q. How deep would you say that hold was down there?
A. I should judge about 30 feet.
Q. And you got that light from your hand light?
A. From my little light I had in my hand.
Q. That is the regular patrolman's search light?
A. Yes, sir.

The Court: One of those electric lights?
The Witness: Yes, sir.

Q. What became of these young men after you saw them?
A. Well, what do you mean, what did we do with them?
Q. Yes?
A. Well, we stayed there, both of us and helped put one man on a stretcher; after we had him tied on, we went down and the deck crew lowered him down to us and we took him from there and took him right out to the hospital.
Q. What about the other man?
A. The other man was lying on the dock when we got back there. We went away and came back and took him out.
Q. How long were you going out there and going back from the hospital, coming back from the hospital?
A. It wasn't over half an hour.
Q. How long were you on the Edwin N. Ohl, on the deck?
A. We were up there probably about ten or fifteen minutes, I couldn't exactly say the time. It wasn't over that.

Q. Did you notice whether there was any other boat work-
152 ing in the same slip at the coal dump there?

A. Well now, I don't remember, I couldn't say.
Q. There was a coal dump over there somewhere?
A. Yes, there was something over there but I didn't pay any attention.
Q. Did you notice whether there was any lights on these coal docks?
A. There was light up over there, but quite a ways away.
Q. Did the lights on the dock throw any lights on the deck?
A. No, sir, no light from there whatever.
Q. When you went off the deck of the Ohl, what did the man with the lantern do?
A. He stayed there. I used my own light to find my way down.
Q. To find your way down off the deck?
A. Yes, sir.
Q. Was there any light upon the ladder?
A. No, sir, not when we went down.

On cross-examination he said:

* * * * * * *

Q. You weren't there when they were gotten out of the hold?
A. No, sir, they were on top when we got there.
Q. You say it was dark down in the hold?

A. It was dark down in the hold.

Q. Whether it was dark in the hold at the time they went down there and got hurt, you don't know do you?

A. I don't know, I wasn't there then.

153 Q. Whether it was dark in the hold when they got hurt you don't know?

A. I don't know.

* * * * * * *

Whereupon plaintiff rested.

Defense.

To maintain the issues on its part, defendant introduced FREDERICK L. LECKIE, who testified that he had interviewed the witness Perry the day after the accident, and that J. C. Perry said there were plenty of lights around there when he was there.

Captain RICHARD NEVILLE was called by defendant, who testified he was master of the Edwin N. Ohl in 1913.

Q. Now Captain, after you got to Sandusky on this occasion, what were your duties?

A. Why, my duties was to go to the custom house and report and then look after the cargo of the boat.

Q. Were you in Sandusky all the time your boat was there?

A. Yes, sir, all the time.

Q. Did you leave your boat at all?

A. Yes, I left the boat Sunday and went up town for a couple of hours and left it on Monday and went up town for a couple of hours.

Q. Were you off the boat at all on Tuesday?

A. No, sir. To tell the truth—well, maybe I was off

154 for an hour or so, that is, up to the dock and back again.

Q. Do captains of boats have occasion at all to go to the dock office while they are there?

A. Yes, sir.

Q. What is the occasion of that?

A. To find out about the cargo and when they are going to get it and all about it.

Q. Can you remember whether or not you were ashore along towards evening of Tuesday?

A. Why, I was on the dock, that was all.

Q. Did you give any directions or orders from the dock with regard to your cargo at all?

A. Yes, sir, they told me——

Objected to.

Q. What were those orders?

Objected to.

The Court: He may state when they were going to load, if he knows.

Q. Go ahead, Captain?
A. The Steamer Wilkinson was under the cargo dump.

The Court: State when you were going to load that night.

Q. Those directions you got at the dock were with regard to your cargo?
A. Yes, sir.
Q. What were they?
A. That I could get ready, that they were going to take the other boat and put her in.
Q. Did you do anything, give any orders towards your boat in that direction, in that connection?
A. Yes, sir, I did.
155 Q. What were those?
A. I came aboard——

Objected to. Overruled. Exception.

A. (continued.) I came aboard the boat and gave orders to the second mate to get her ready to load coal.
Q. What did he do in connection with that, if you saw?
A. He took off Number 22 hatch.
Q. About what time was that?
A. That was somewheres around after 8 o'clock, close to 9.
Q. What about the lights in connection with that taking off of that hatch?
A. There was orders given to turn on all the lights on the boat.

Which answer was objected to by the plaintiff and the plaintiff moved the Court to strike out the same, which motion was sustained by the Court, to which ruling of the Court the defendant then and there duly excepted.

Q. Were there any lights turned on or were they burning on your boat, to your own knowledge, before the time of heaving off this hatch?
A. Yes, sir.
Q. What light?
A. The lights on the boiler house and the lights in the cargo hold, the lights in the after end of the ship and on the forward end of the ship.
Q. After the hatches were hove off were any other lights put out there that you know?
A. Yes, sir, there was a lantern put on each side of the hatch that was taken off.
Q. And just where were they put?
A. Right in the middle of the hatch.
156 Q. What do you mean by the middle of the hatch?
A. The telescopic hatches were piled up on each side and they were set on the end of the board, each of them.
Q. One lantern on either end?
A. Yes, sir, right at the edge of the hole.
Q. Were those lanterns lighted?

A. Yes, sir, they were lit.
Q. And burning?
A. And burning.
Q. On the Ohl, Captain, has the hatch got a coaming, all the hatches?
A. Yes, sir.
Q. What is a coaming?
A. A coaming is a piece of iron angle shaped at the bottom and flat on the top, about a foot high, that these hatches rest on and they slide back and forth on them.
Q. Were those all the same height all the way along?
A. Yes, sir, they are all the same height.
Q. When the hatches are on, the covers hoved on, how much passageway is there between the end of the hatch and the outside of the ship?
A. I should say about eight or nine feet.
Q. And when they are hove off, piled up on the end, how much passageway is there between them and the side of the ship?
A. I should say three feet.

Mr. Holding: How much?
The Witness: Three feet.

Q. Where were you, Captain, on that ship when you got word of this accident?
A. I was up on the forward end of the ship.
157 Q. Just where, in your room or outside?
A. I was outside, on the deck, sitting in a chair.
Q. Anybody with you?
A. My wife was with me.
Q. And how did you get word?
A. The first mate came up and told me.
Q. What did you do?
A. I went right down on the deck.
Q. And where did you go?
A. Right down and looked at the two men.

* * * * * * *

Q. Where were the men after you got back there to the hatch, were they still down in the hold or were they on deck?
A. No, sir, the second one, they were lifting him out.
Q. How about the condition of the lights then, when you got back there?
A. The lights were all burning.
Q. Were they any different from what they had been previous to that time?
A. No, sir.
Q. What was the condition of the atmosphere that night, Captain?
A. It was a clear night, it was a warm night.
Q. Was there any smoke or fog or anything of that sort to obscure the atmosphere?
A. No, sir, it was a clear night.
Q. Any coal dust?

A. Not much, because the coal, the car comes down and runs under a sprinkler and that stops a good deal of that dust.

Q. By wetting it down?

A. Yes, sir.

158 Q. At any rate, yourself and ladies were sitting out on deck?

A. Yes, sir.

Q. You did see that the men were sent off to the hospital?

A. Yes, just as quick as I could.

Q. The Ohl, Captain, with regard to her hatches and lights and the method of handling them and of turning on and off the lights and so on, was there any difference in any respect from the ordinary lake freighter of her same size?

The Court: Describe what arrangement was there for turning off and on the light.

A. The Edwin N. Ohl is an up-to-date ship.

Q. Are they electric lights?

A. Yes, sir.

Q. And where is the dynamo?

A. In the engine room.

Q. How are they handled?

A. Right from the engine room.

Q. What is the method of handling them?

A. Why, the oiler on watch or the chief engineer, he turns them on.

Q. You had a switchboard in the engine room?

A. Yes, sir.

Q. And throw in a switch the same as any ordinary switchboard?

A. Yes, sir.

Q. And how about the hatches on your ship?

Objected to.

Q. Are they any different from the ordinary type of hatches?

A. They are the latest improved.

Q. Are they any different from the ordinary hatches on the same type of boat?

A. No, sir, about the same.

159 Q. About the same; are they any different?

A. It is the latest up-to-date hatch.

Q. Well, are they different from any other hatches in any way?

A. On some boats steel hatches and other boats, wooden hatches.

Q. Take boats the type of the Ohl, modern steel steamship; is there any difference in that respect from the rest of them on the lakes?

A. No, sir.

Q. When the hatch is closed and the cover on so that they are spread out singly, how high would the hatch be above the deck?

A. Well, say about 13 or 14 inches.

Q. And when they are hove off and piled up on the end, how high would the pile be above the deck on the end?

A. Well, five hatches to a side, that would be, say, an inch and a half higher than the coaming of the hatch.
Q. That would be 14 or 15 inches, something like that?
A. Yes, sir.

On cross-examination he testified that he had been master of lake freighters for ten years.

Q. Captain, you say your name is Neville?
A. Yes, sir.
Q. And you have been sailing steel lake freighters for how long?
A. Well, I have been master for ten years.
Q. And you consider yourself a competent and careful seaman, do you?
A. Well, I always try to be.
160 Q. You try to take all precautions for the safety of the crew that is under you?
A. Yes, sir, I always have.
Q. And in these precautions when your boat is not engaged in taking on or discharging cargo, you keep your hatch covers shut?
A. Yes, sir.
Q. That is the custom of the Great Lakes, isn't it, Captain, to keep those hatch covers shut when you are not taking on or taking off cargo?
A. If you are waiting to take on cargo, you take them off.
Q. Just before you begin to take on your cargo you open your hatches?
A. Always.
Q. But not until then; now, as a matter of fact——

Mr. Holding: Wait a moment, don't trap that way, that is a question.

Q. Did you answer me or not?
A. I answered one question.
Q. You don't open your hatches until you get ready to take on your cargo or take it out?
A. Until we get some orders of some kind from the dock.
Q. Well, your orders that you refer to, is to get ready to take in your cargo, isn't it?
A. Yes, sir, or take it out.
Q. So that you don't open your hatches until you get ready to take on cargo?
A. No, sir.
Q. Now, when you do open hatches you don't open one hatch and leave all the rest closed, but open the hatches along the deck of the ship, don't you?
A. Sometimes we do and sometimes we do not.
161 Q. Is there any occasion of opening just one hatch and leaving all the rest closed?
A. Yes, lots of occasions.
Q. Why would you do that?

A. That would be so as to start to load the minute we get under the machine.

Q. You would just use one hatch in loading?

A. That is according to how many cars you are going to get.

Q. How many cars were you going to take on that night?

A. We were going to take a cargo.

Q. A full cargo?

A. Yes, sir, we were supposed to.

* * * * * * *

Q. Now, sir, when a boat is lying in port, waiting for a cargo, you don't have your dynamos working below, do you, in the engine room?

A. We do.

Q. All the time you are in port?

A. Yes, sir.

Q. Is that the custom on other boats?

A. Yes, it is the custom on all boats.

Q. The dynamo is operated by a switch in the engine room?

A. Yes, sir.

Q. You get in there about once every two or three weeks, do you?

A. In where?

Q. In the engine room?

A. I walked in there every day.

Q. Were you in that night?

A. No, sir, I don't think I was.

Q. You don't know whether the oiler or engineer turned those lights on or not or whether he turned them off or not, you
162 don't know who it was that operated those lights that night?

A. Yes, sir, I do know.

Q. You do know who operated them?

A. The chief engineer of the boat.

Q. From what he told you, you didn't see him do it?

A. He was aboard the boat.

Q. Did you see him operate those lights that night?

A. Why, the lights was lit, that is all I know and I know that they were being operated.

Q. Do you want to answer my question; did you see him operate the lights that night?

A. No, sir.

Q. Was it the engineer or one of the oilers that operated the lights that night?

A. I say——

Q. Do you know?

A. Well, I will tell you, the engineer is supposed to be in charge at all times.

Q. I say, do you know who operated the lights that night?

A. Well, it was either him or the oiler, I don't know.

Q. If you don't know, tell the jury so, but don't guess at it?

A. Well, I don't know for sure, it was either the chief engineer or the oiler.

Q. Now, when your hatch covers are on, you don't pretend the lights are lit down in the cargo hold?

A. No, sir.

Q. Now, you can switch those on by the controller in the engine room and light one compartment or another, as you elect?

A. Yes, sir.

Q. That is as the man in the engine room elects to light them?

A. Yes, sir.

163 Q. Did you make an inspection of the deck that night yourself?

A. Yes, sir, I did.

Q. To see whether the lights were lit in the cargo hold?

A. Yes, sir.

Q. Now don't you know as a matter of fact it was so dark in there they had to take lanterns in there to get these men out that night?

A. Why, the cargo hold was lit up as plain as daylight, you could read a newspaper.

Q. When was this?

A. You can stand from the lights of the boiler house and read a newspaper six feet away from it.

Q. On the boiler house?

A. Yes, sir.

Q. There is a light on each side of the boiler house?

A. There are lights in the cargo hold.

Q. Did you look down in the cargo hold until the time they were taking these men out?

A. I looked in the cargo hold when they took the hatch off and I looked in the cargo hold when they were taking the men out and the lights were lit all the time.

Q. You say you had a lantern on each side of that hatch?

A. Yes, sir.

Q. Where were those lanterns when these men were taken out of the hold?

A. Sitting right there.

Q. Were they lit or not?

A. Both lit.

Q. You gave a statement to Mr. Leckie as to this thing immediately after this accident, I suppose; how soon did he get there after the accident?

A. He got there about 7 or 8 o'clock in the morning.

164 Q. That is, as soon as you could get to a telephone you worked the telephone to get the lawyer down to get some statements, did you?

A. Yes, sir, I did, so he could see for himself and find out.

Q. Now, sir, as near as you can recall, what was the boat across the slip that was putting in coal?

A. The Steamer Wilkinson.

Q. That is the U. S. T. Company?

A. Yes, sir.

Q. And she got out along about midnight?

A. Why, yes, sir.
Q. How did you get your boat acros- the slip?
A. Why, we stretched heaving lines across.
Q. You didn't have steam up in your engine?
A. We don't need to work our engine.
Q. Answer my question, did you have steam up in the engine?
A. We had steam up ready to use it — we wanted it.
Q. You didn't have steam pressure enough to work your engine to move your boat?
A. Yes, sir.
Q. Notwithstanding that, you worked her across the slip with heaving lines?
A. With cable machine.
Q. You got somebody to take a cable to the other side of the slip and used your deck engines to work her across?
A. Yes, sir, just heaved her over.
Q. Now, this boiler house you speak about is somewhat wider than this room, isn't it?
A. The boiler house is about 40 feet wide.
Q. About the width of this room?
A. I don't know whether this is 40 feet or not.
165 Q. Now, all the light- that you have got on that boiler house when they are lit, are two little 16-candle power incandescent lights, right about as high as the door above the deck?
A. Yes, sir.
Q. One on each corner of the boiler house?
A. Yes, sir, and around on the side.
Q. Well, that is down where the passageway is, companionway into the engine room, is?
A. Yes, sir.
Q. Now, right in front of that boiler house is your deck engine?
A. Yes, sir.
Q. And that stands about in a space of 15 feet in width and extending across the boat?
A. I should say, yes, stood right in close to the boiler house.
Q. Now, there is no globes over these little electric lights on the boiler house?
A. Yes, there is another globe outside.
Q. Is that a frosted globe or clear?
A. No, sir, it is clear.
Q. Do you know when those globes were cleaned?
A. They are cleaned every trip.
Q. Do you know when they were cleaned before this day?
A. Yes, sir, we cleaned them always when we scrub the ship.
Q. Do you know when they had been cleaned before this accident?
A. I couldn't say for sure, all I know is that the orders were at all times to keep all globes cleaned and these lights were cleaned.
Q. If you don't know, just say so; now, the air was heavy with coal soot that night?

A. No, sir.

166 Q. Around in those car dumps, isn't there a great quantity of coal dust flying at all times?

A. There is a little but not a great quantity.

Q. Don't you know when a vessel is loading coal under one of those plants, that there is coal soot away up around your pilot house and all over your boat, so when you put to sea you have got to scrub down all of your boat?

A. Well, there is a little.

Q. You scrub down clear forward and aft to get rid of that coal dust the minute you put out to sea from the coal dock?

A. Yes, sir, we do.

Q. There is coal soot over everything?

A. Not so much.

Q. Don't you close all your dead lights and all your windows with canvas to keep the dust from getting into the rooms?

A. No, sir.

Q. You don't shut off the soot out of your room?

A. No, sir.

Q. How long did you stay up forward there with your wife that evening?

A. Until just before twelve o'clock.

Q. Were you out on deck or had you gone to bed when this accident occurred?

A. I was sitting up forward when this accident occurred.

Q. What was the first you knew of it?

A. The first mate came up and told me.

Q. That was the first that occurred to you?

A. Yes, sir.

Q. When you began to load coal that night, in what compartment did you start to load?

A. In No. 4 compartment.

167 Q. That is the after compartment of the boat?

A. Yes, sir.

Q. In what hatch?

A. Number 22.

Q. What other hatches were open when you started to load?

A. Just as soon as they start to load then they run the other hatches off.

Q. How long does it take to open a hatch on the deck of that boat?

A. Well, to open one hatch it would take about four minutes.

Q. Not that long, would it?

A. Three or four minutes.

Q. Open them all would take about a half or three-quarters of an hour?

A. Half an hour, I would say.

Q. So that you could have opened that one hatch, 22 hatch, while you were working across the slip if you wanted to?

A. No, sir.

Q. Well, you could close it after you worked across the slip?

A. We place for the car dumper, to lower it down.
Q. They don't lower it down until you tie your lines to the dock?
A. As soon as we tie up they lower that spout.
Q. You could open that hatch in four minutes, you say, at the outside, after you got to the coal dock?
A. Yes, sir.
Q. There are lights on the loading plant, aren't there?
A. Yes, sir.
Q. There are incandescent lights there; the reason you say you couldn't have opened it while you were working across the
168 slip was because you were working your deck engine, working your heaving lines?
A. Yes, and some of the crew wouldn't be there, going on the dock to handle lines and the rest handling the machines.
Q. Do you know what time your orders came to move across the slip?
A. They always give you orders to get ready.
Q. Do you know what time your orders came to move across the slip?
A. As soon as the steamer Wilkinson got out of the way.
Q. And she didn't start to get out until midnight?
A. After that.
Q. Then you started after midnight to move your boat across that slip?
A. Yes, sir, the mate done that.
Q. Had you gone to bed?
A. Yes, sir.
Q. You didn't pay any attention to getting your cargo in?
A. I looked around and after I saw everything was going all right I went to bed.
Q. As a matter of fact, it is the mate's business to look after the cargo?
A. Yes, sir.
Q. You are the navigator of the vessel and you get her up the lakes and back again and the mate sees about getting on cargo and about getting cargo out of her?
A. Yes, sir.
Q. And if there is any extraordinary business arises, you look into that, the mate comes to you?
A. Yes, sir.

Q. Now, do you say you gave the orders personally to
169 open Number 22 hatch and leave the other hatches closed?
A. Yes, sir.

Q. So that you were the responsible party for that one hatch on that whole length of that boat being open and the rest closed?
A. Yes, sir.

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Q. Captain, I will ask you another thing, you think the watchman was on deck that night near that open hatch, do you?
A. Yes, sir.
Q. If he wasn't there, he should have been there?

A. He was right there at the ladder.
Q. If he wasn't there, he should have been there?
A. Yes, sir.
Q. You say he was right at the ladder when those boys came aboard?
A. Yes, sir.
Q. You weren't there at the ladder when those boys came aboard?
A. No, sir.
Q. You say that from what you heard?
A. I say it because I know he was at the ladder. I was sitting on the deck up forward in a chair.

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Q. You don't mean the jury to get the idea that that dock foreman gives orders to you?
A. Yes, sir, about cargo, to load the boat.
Q. He tells you when the cargo will be ready?
A. Yes, sir.
Q. And when to bring your boat over?
A. Yes, sir.
Q. He doesn't tell you anything about what you shall do with the deck of your boat?
A. He says to get her ready.
170 Q. He says to get her ready?
A. Yes, sir.
Q. You get her ready to move her across the slip, is that it?
A. Yes, sir.
Q. Now, you thought it easier to open that hatch at eight o'clock in the evening, before you moved across, than after midnight, when you did move it across?
A. Well, we had the hatch off and then we were expecting any minute to go across, that is why.

On redirect examination:

Q. What is the method of getting order and carrying out the work on a steamship, to whom do you give your orders and who carries out the work?
A. I give the first mate the orders and he goes through with it.
Q. Do you go around and talk to each individual man of your crew?
A. No, sir.

* * * * * * *

Q. What did the foreman of the dock say to you with reference to the Wilkinson's cargo and your cargo?
A. He said, "The Wilkinson's cargo ain't got here, get ready and come right across as soon as she gets out."
Q. Do you know whether the Wilkinson completed loading her cargo after you went away?
A. Yes, sir, after we got out they put the Wilkinson in and finished her, her cargo being a different kind of coal than ours.

Q. Well, the Wilkinson was only partly loaded when she left the dock?

A. Yes, sir.

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171 Q. I will ask you this, Captain, when you are shifting your boat to go across to get under the car dump, can you at the same time heave off your hatches?

A. Well, we never do.

Answer objected to as not responsive. Answer stricken out.

Q. (Question read.)

A. I suppose we could, but then we never do.

Latter part of the answer stricken out.' "But then we never do."

Q. Is there a custom on the Great Lakes with regard to that matter?

A. Yes, sir, there is.

Q. And did that custom prevail in the port of Sandusky in the season of 1913?

A. Yes, sir.

Q. What was the custom?

A. The custom is to get your hatches off and get ready when you are going to take in cargo or to unload it.

Q. Now, what is the custom, Captain, with regard to heaving your boat or handling her along the dock and heaving your hatches off at the same time, is there any such custom?

A. No, sir.

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FRANK A. ROBINSON, sailed for 24 years, and first mate of the Ohl, testified that on Labor Day he went to Cleveland to see his wife and family.

Q. About what time did you get back to your boat on Tuesday?

A. Oh, I would say 7:30 or a quarter to eight, something like that.

172 Q. In the evening?

A. In the evening, yes, sir.

Q. As you came down to your boat, did you pass along the dock office?

A. Yes, sir.

Q. Did you find out anything about your cargo as you came along the dock?

A. Why, they told me there that we would be under the dump most any time.

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Q. (Question read as follows:) Did you find out anything about your boat as you came along the dock?

A. Yes, sir.

Q. What did you find out?

A. That we should expect to be ready to load at any time.

Q. As you came aboard your boat did you give any orders in connection with the cargo and to whom?
A. I was talking to the second mate about it.
Q. What did you say?

Objected to.
The Court: What orders did you give?

Q. What did you do?
A. Talked to him about the hatches.
Q. What did you say to him, what orders did you give him?

Objected to. Overruled.

A. With reference to the hatches?
Q. Yes.
A. Spoke to him about the hatches, if they were off, any of them, and he said they was.

The Court: That some of them were off?
The Witness: Yes, sir.

173 Q. What are the duties of the first mate of a boat, with reference to the cargo?
A. To see that the cargo is placed in the right part of the boat and see that she is loaded properly on even keel.
Q. He is to load her?
A. Yes, sir.
Q. Does he have to see that she is gotten ready for the loading?
A. Yes, sir.
Q. Well, what was done, Mate, when you came aboard the boat?
A. I talked with the second mate pertaining to getting the hatches ready. He said there was one hatch off and his orders from the captain were——

Objected to. Overruled.

A. continued). —that we would expect to get cargo any time, receive cargo at any time, get orders to shift to the dock.
Q. Where did you go on your boat?
A. Why, I was forward and I was aft, I was practically all over the boat, seeing just the actual conditions of things as I returned from Cleveland.
Q. What did you see, whether you noticed yourself there were any hatches on or off?
A. Yes, sir, there were hatches off.
Q. What hatch was off?
A. Number 22.
Q. What about the condition of the lights on the boat when you looked around there at that time?
A. I came down the dock and I noticed the boat was lying there brightly lighted and as I came up the ladder there was a light hanging at the ladder level with the deck. It is always customary
174 to have a light there and as I passed down the deck I noticed the bright light coming up from this one open hatch, from

the light from the cargo hold, coming from the cargo hold lights. Also on the end of each hatch, end of each end of this hatch that was off, there was a brightly lighted lantern setting at the end of the hatch, on the port side and on the starboard side.

Q. Any other lights, and ship lights?

A. The Steamer Wilkinson was loading cargo right across the ship from us, also with electric lights burning on the boat.

Q. Were there any more lights upon your own boat, any more ship lights on your boat?

A. Yes, we had our deck lights.

Q. What deck lights were there anywhere in the vicinity of this Number 22 hatch?

A. Lights all around the boiler house, e-pecially on the forward side of the boiler house and on the sides of the cabin.

Q. Just describe those lights, tell what sort of lights and where they sat, how high up, where they threw their reflection.

A. Such lights as are on the boiler house, incandescent lights, such as common ordinary electric light bulbs, 16 candle power, Mazda lights, I believe they are called, and they are screwed into a socket and receptacle which is fastened on the forward side of the bulkhead, that is, the forward side of the boiler house, which is called the bulkhead. To protect those lights from being broken or
175 jarred loose, they are screwed in a spring socket or maybe some other kind of a receptacle, only it has a place for the current to come through. There is a globe, I should say probably a foot long, maybe, and that has a guard over, good, solid heavy glass screwed over for protecting those lights, very clear and shows the light through. These are not screwed in so they throw the light down but screwed so that they throw the light out away from the forward side of this boiler house and they are probably about the height of your head, a little higher, maybe, so that you wouldn't, in passing under them, hit them with your head.

Q. Now, with regard to the surrounding lights, what lights were there around there anywhere that lighted up the vicinity, not on your own boat?

A. There was lights on the dock, there were bright lights burning there, there were arc lights around, I don't know just how many, they have moving cars up and down all the time, going up and down and they have to have these lights burning there.

Q. How far from your deck near Number 22 hatch was it over to the Wilkinson's side?

A. Oh, I wouldn't think over 25 to 30 feet, from the outside side of our boat to the outside side of their boat.

Q. How far to the dock, car dump part of the dock?

A. Well, I don't know the exact beam of the Wilkinson, but I would say it was about 50 feet altogether. She lay close to the dock.

Q. Her side close to the dock?

A. She laid up close to the dock.

176 Q. How high are those arc lamps on the dock?

A. Oh, I should think that they are probably 20 feet high.

They are all on a high pole that stands up so as to throw the rays of light all over the dock.

Q. How high would the dock lights be above the deck of your boat as you were that night?

A. Oh, I should think they was probably up six, eight or ten feet from the dock.

Q. Now, after you had looked around and seen these lights, where did you go on your boat?

A. I was aft, went aft into the gallery.

Q. I am coming down now close to the time of the accident; where were you on your boat?

A. At the time of the accident I was forward.

Q. Whereabouts forward?

A. Sitting in a chair at Number 1 hatch.

Q. Is there anything, any deck house or anything to obstruct your vision up and down the deck there?

A. Nothing whatever, sir.

Q. From where you were sitting in your chair at Number 1 hatch could you see those lighted lanterns down at this Number 22 hatch?

A. Yes, sir.

Q. Did you see them?

A. I did.

Q. Did you notice these two young men, John and the other young man, come aboard that night?

A. I noticed that they were aboard.

Q. What were they doing that you saw?

A. They were on the deck, just idling, seemed to be doing nothing at that time. I also saw them come forward after I was sitting on the hatch.

177 Q. Come up forward and went back again?

A. Yes, sir.

Q. What was the first you knew of any trouble?

A. Some man came running up the deck, the watchman, I took it to be, I couldn't exactly tell but I supposed it was the watchman, came running up the deck and said two men fell in the hold.

Q. Then what did you do?

A. I immediately went aft, in answer.

Q. What did you find and do?

A. I looked down in the hatch and saw the men lying there and my first thought was of an ambulance, accident—ambulance.

Q. What did you do?

A. I went right straight down the ladder, right to the office and called the office man and he ordered an ambulance down.

Q. By telephone?

A. By telephone.

Q. Then where did you go?

A. I went back to the boat.

Q. What did you do when you got back to the boat?

A. Assisted in getting the men out of the hold.

Q. Did you get the men out of the hold?

A. I assisted.

Q. How did you assist, what did you do?
A. Taking hold of a rope, helping to pull out the men.
Q. Any directions?
A. Yes, sir, giving directions and so forth.
Q. Now, did you get stretchers?
A. Yes, sir.
Q. And laid the men on stretchers?
A. Yes, sir.
178 Q. What did you do with them when the ambulance got there?
A. We got the stretchers—as soon as the ambulance came down there, the stretcher was brought and we also got one off the Steamer Yuma and one man was laid on the stretcher and we fastened him on secure and got a ladder and put it up against the side of the boat and one man walked down the ladder and held this stretcher so it wouldn't tip sidewise, to get him safely to the ground, to the dock.
Q. When the ambulance got there and those policemen came aboard, were those men lying in the darkness on deck or were they lying in the litters, waiting for the ambulance?
A. No, sir, they were lying on the deck, on a tarpaulin. We had spread a tarpaulin and they were lying on the tarpaulin.
Q. When you went back there to look down, were the lights burning at that time?
A. Yes, sir.
Q. Did you have any difficulty in seeing the men down there in the hold?
A. No, sir, none whatever.

* * * * * * *

Q. Where are the seaman's quarters on the Ohl, sleeping quarters?
A. They are in the after end of the ship.
Q. How do you get to them?
A. There is a door that leads to the stairway leading down the stairway on the port side of the ship, in the after end of the cabin.
Q. I take it then, their quarters are near the deck, below this spar deck?
A. Yes, sir.
179 Q. And this stairway and door leading to the stairway is on which side, as you were lying that night, the dock side or water side?
A. It was on the dock side.
Q. And the ladder you came up when you came aboard, where was it at the time of the accident?
A. Oh, I would say it was setting about abreast of Number 17 or 18 hatch.
Q. Was it any different from what it was when you came aboard?
A. No, sir.
Q. Was it or was it not on the same side that this doorway that would lead to the seamen's quarters, is?

A. Yes, it was on the same side.

Q. When you got off of that ladder, where did you land?

A. Landed on deck, but there is a space probably six feet between the rail of the boat and the end of the hatch.

Q. Can you state whether or not that space of six feet continued right straight back to this door that leads down into the seamen's quarters?

A. Continued right straight back to this part that leads down into the seamen's quarters.

Q. If a seaman coming abroad desired to go to his quarters, if he had to cross the deck on the water side, would he or would he not have to recross the deck again to go to his quarters?

Objected to. Sustained.

Q. What was the nearest way from the head of the ladder to the door leading down into the seamen's quarters?

A. Right straight aft; just as soon as he stepped over the
180 top of the ladder on the rail, right straight aft.

Q. Were there any hatchways intercepting that way at all?

A. Well, there was a pile of hatches where this pile of hatches had been pulled across, not from Number 22 hatch but didn't clear to the rail. There was a passageway there to the back.

Q. About how much space would there be there?

A. I should say probably two feet.

Q. That space would be in near the hatch or near the rail?

A. Be near the rail.

Q. Were you there when the policemen arrived with the ambulance?

A. Yes, sir.

(Recess.)

Q. What sort of a night was this, how was the weather, the atmosphere?

A. Why, it was a very warm night, absolutely clear, bright sunny day all day, nice clear evening.

Q. Was there any smoke, fog or coal dust or anything to obscure the atmosphere around that boat?

A. No, sir.

Q. Who runs the crew on the boat, who works the men, gives the orders and sees that they are carried out?

A. The mate, second mate.

Q. If you were lying at a dock at night and they called to you from the dock and told you to get ready, about how long would it take you to get your crew around and get a hatch or a few hatches off so as to go to the dock, under ordinary conditions?

A. Under ordinary conditions, I should say probably 20 minutes to a half an hour.

181 Q. When you get directions from the dock to go under the dump, what does your crew do?

A. Well, when we get orders to get under the dump, in this

particular situation that we were in, we prepared to heave across the slip.

Q. When you are doing that, preparing to do it, what are your men doing?

A. On the dock, as a general rule, handling the lines for us.

Q. And some of them on the boat?

A. Some of them on the boat.

Q. What are they doing?

A. They are handling lines also.

Q. And handling the machinery on the boat?

A. Yes, sir, handle machinery; that consists of handling the lines; those lines, as a general rule, are run onto the big drum, the mooring machine.

Q. Did the same men, same members of the crew who shift the boat and handle the lines and so on, are they the same members of the crew who are used to get the hatches on and off?

A. Yes, sir.

Q. Now, when those police officers got down there after your call, about how long was it afterwards, after the accident, would you say that the policemen came along?

A. Oh, I should judge about 25 minutes.

Q. And what was the condition of the lights then when they came aboard, were they any different than they were before?

A. No, sir.

Q. The same lights burning in the same place were they?

A. Yes, sir.

182 Cross-examination.

By Mr. Eichelberger:

Q. Mr. Robinson, you were with the Ohl all season, were you, all last season?

A. Practically all season.

Q. How long have you been in the Becker line or Valley Steamship Company?

A. I don't know, about seven years, something like that.

Q. You have been with that line a long time?

A. Yes, sir, six or seven years.

Q. Have you got master's papers?

A. Yes, sir, I have a license, master's license.

Q. You have a master's license now?

A. Yes, sir.

Q. Did you hire those boys up at Manitowoc, or was it the second mate?

A. It was the second mate that shipped those men.

Q. The second mate hired those men over at Manitowoc?

A. Through my instructions, yes, sir.

Q. Had you any conversation with the boys when they came aboard?

A. One of them.

Q. Which one?

A. John, John Wattawa, I believe his name was.
Q. When was that, when he came aboard?
A. He came aboard the boat and wanted to know if there was a place for him and I said, "Did you ever sail before?" "Oh, yes," he said, "I put in some on the Reiss, sailed on the Reiss." "Well, I haven't got anything for you to do, John, but if you will come around tomorrow and there is a place, possibly I can give
183 you a chance, come around tomorrow." "All right." The next day we wanted some men, John didn't show up. I went ashore to look after some men, giving instructions to the second mate if John came, to ship him.
Q. When you came back he had come aboard and was shipped?
A. Yes, sir.
Q. Did you ever talk to him again afterwards?
A. Oh, I don't know as I did right then and there.
Q. I mean at any time at all after he was hired, did you ever have any conversation with him?
A. Only in the line of duties, orders.
Q. Just giving orders?
A. Just giving orders, that is all.

* * * * * * *

Q. When you came aboard you found all the hatches were closed except the Number 22?
A. Yes, sir.
Q. And the second mate told you that had been opened by the captain's orders, I believe you said?
A. Something of that sort.
Q. So that with the opening of that you had nothing to do?
A. No, sir.
Q. When you came aboard the boat, did you go back and look at Number 22 hatch?
A. Yes, sir.
Q. Did you ask why it had been left open?
A. No, sir.
Q. He already told you that?
A. I knew.
Q. You said the first thing he told you, the second mate told you, now, the boys were ashore at that time, these two boys
184 that were injured?
A. I can't say as to that.
Q. In any event, after you got there you went up and sat up on Number 1, 200 or 300 feet away from the ladder, that is about that far?
A. Yes, sir.
Q. And sitting on Number 1 hatch, that was right close to the lights on the forward deck house?
A. Well, they were behind me probably 12 or 15 feet.
Q. The same lights you have described as being on the boiler house are on the forward deck house?
A. Yes, sir.

Q. That is, the boiler house is about as wide as this court room, isn't it?

A. Well, I should judge about that wide.

Q. A little wider, if anything?

A. No, I don't thing it is any wider.

Q. It is about 40 feet wide, that boiler house and about as high as that doorway (indicating); on each corner are those 16 candle power incandescent lights?

A. Yes, sir.

Q. The lamps are the same up on the forward deck house?

A. Only there is four lights there instead of two.

Q. Up forward?

A. Up forward.

Q. And you stayed there how long, would you suppose, before somebody came and told you that the men were hurt?

A. Oh, I should judge probably ten minutes, something like that.

185 Q. How long had you been aboard the boat at that time?

A. Well, I should think I had been aboard the boat over an hour.

Q. These lights that are down in the cargo hold are up underneath the decking, they are up at the ends of the hatches but underneath the deck, is that so?

A. They are on a beam that supports the deck.

Q. They are up under the deck so their light shines down in the hold?

A. They are not up under but they are under, on this beam that supports the deck.

Q. Well, they are out of the way so that the lumps of coal will not hit the light and break the lamp there; they have to protect them?

A. A wire screen over them.

Q. They don't project down into the cargo hold?

A. They go fore and aft, run fore and aft.

Q. And that is to light the hold at night to help the trimming of the boat when the boat is taking cargo?

A. Also to throw light, throw the flame of light, that is, rays of light come up so that you can see that the hatch is open.

Q. Well, now, I am not asking you about that, that is not the purpose of those lights down there in the cargo hold?

Objected to.

The Court: What is the primary object of those lights?

Mr. Eichelberger: The object of those lights is to light the cargo hold for the trimmers.

The Court: Answer the question, what is the primary ob-

186 ject of their being there?

The Witness: To make a light.

The Court: For the trimmers?

The Witness: For the trimmers, or the loading or unloading of the cargo.

Q. For the loading and unloading of the cargo; they are not there

to light the deck, that is not part of the function of those lights, to throw light out on the deck?

A. You state that as a question, do you?

Q. Yes, sir.

A. Yes, sir, they are there to throw light up through the hatch so that the hatch may be seen if it is off.

Q. Why isn't it easier to close those hatches than to turn the lights on and throw the light up, why isn't it easier to close the hatches?

A. I don't know as it is any easier to close the hatches.

Q. You say that those lights are put there to light the deck and not the cargo hold?

A. No, sir.

Q. You say that part of the business of those lights is to light the deck?

A. I certainly do.

Q. You want the jury to understand then that those lights stuck under the deck so that the deck projects out over them, are for the purpose of lighting the deck?

A. Lighting the open hatch, sir.

Q. Lighting the open hatch so that anybody looking down there can see the bottom of the hatch, is that it?

A. Certainly.

Q. It isn't any business of those lights, they are not there, not intended to throw light up onto the deck for anybody to see
187 on the deck, are they?

A. To show that there is an open hole there.

Q. Now, if you are so particular about showing an open hole, why didn't you close that open hole to protect it?

A. Because we were getting ready for cargo.

Q. It would take you about four minutes to open that hatch, wouldn't it?

A. About four minutes to close it?

Q. Wouldn't it or would it take longer?

A. It would take longer.

Q. Would it take five?

A. Yes, it would take longer than that.

Q. Well, how long would it take?

A. Oh, probably ten minutes to run them wires out.

* * * * * * *

Q. There are 23 hatches on that boat?

A. Yes, sir.

Q. Now, you are an experienced seaman, how long would it take you to get all that deck open, uncovered, every hatch uncovered on that boat?

A. Oh, I should say probably half an hour.

* * * * * * *

Q. Where was the watchman when you came aboard?

A. Where was the watchman when I came aboard?

Q. Yes, sir.

A. He was on deck, met me at the head of the ladder.

Q. That is where he belonged, wasn't it?

A. Not exactly. His duties can take him all over the ship.

Q. Did he take a lantern with him?

188 A. I don't think he did.

Q. Was there a lantern hanging on the ladder when you came aboard?

A. Yes, sir.

Q. When this policeman came aboard, didn't the watchman have the lantern off the head of the ladder, in his hand?

A. I don't think he did.

Q. Did you see those two men come aboard, these two police officers?

A. I believe I did.

Q. Now, didn't your watchman take that lantern, unfastern it from the ladder and take it to light them down the deck?

A. I don't believe he did, no, sir.

Q. Are you guessing at it or are you saying what you know?

A. Well, I am not guessing at it.

Q. Are you talking about what you know?

A. Yes, sir.

Q. You say that he did not take the lantern and light these men down the deck?

A. He didn't take the lantern.

Q. Was the lantern hanging on this ladder when these men went ashore?

A. Yes, sir.

* * * * * * *

Q. Now, as a matter of fact, there wasn't any occasion for any light being on in the cargo hold at all before they told you to come over to the ship, was there?

A. Oh, yes.

Q. What was the occasion?

A. The open hatch.

Q. Because that was a dangerous place, is that true?

A. It is customary to light the open hatch.

189 Q. Because that is a dangerous place there, to have a hatch open?

A. To light the open hatch.

Q. You heard what I said, did you?

A. Yes, sir.

Q. Just say whether you want to answer it or don't want to answer it; that open hatch was a dangerous place there for anybody on the deck of that boat?

A. Not for any sailor that understood his business.

Q. How long would you say or would you think there were two lanterns at either end of that hatch?

A. Yes, sir, one lantern at either end of the hatch, one at each end.

Q. How long would it take you to get those lanterns, light them and stick them up at the hatch?

A. Well, the watchman would have to walk the length of the ship,

go down in the lamp room and get the lantern and light it and get the matches, maybe, may not have any right in his pocket.

Q. Might take him ten minutes?

A. Yes, sir.

Q. Now, it would have been quicker to close that hatch, wouldn't it?

A. Quicker to close the hatch?

Q. Yes.

A. Than to do what?

Q. Than to get those lights and stick them out there.

A. Would have been about the same thing.

Q. What?

A. About the same thing.

Q. It would have been a lot safer to close the hatch, wouldn't it?

A. No, not to us.

190 Q. Did you take charge of the boat and move her across the slip?

A. I did.

Q. What time of the night did you do that?

A. Oh, I don't remember, I should say around midnight.

Q. How much after midnight?

A. Oh, I couldn't tell the exact time.

* * * * * * *

M. A. BAIZAIRE, second mate of the Ohl, testified that he was on the boat all the day of the accident and in charge of the deck.

Q. What were you doing at that time, September 2?

A. We were cleaning up the cargo hold.

Q. What did you do to clean up the cargo hold, what does that mean?

A. It means after unloading iron ore, we clean up the remains of the ore which is left in the cargo hold, getting ready for a coal cargo.

Q. What did you have to do with that and what men on your boat did you use to do that?

A. All the deck hands and ordinary seamen, watchman and boatswain and they use shovels and brooms for that purpose.

Q. You remove the hatches, do you?

A. Yes, sir.

Q. Who removes the hatches?

A. The boatswain is the man, he and his men.

Q. His men include whom?

A. The deck hands.

Q. Did that include John Wattawa, one of the deck hands, on this occasion?

A. Yes, sir.

191 Q. And then after the hatches are open so that you can get at the hold, those men go down and sweep it up?

A. Yes, sir.

Q. What time during the day did you finish that work?

A. Why, it was after supper time, I should say about 6:30 in the evening.

Q. And had it gotten dusk or dark yet at that time of the night?

A. Yes, sir, it had.

Q. Can you tell us whether or not your dynamo was going and your lights burning in the hold?

A. Yes, sir, they were.

Q. To finish up that work?

A. Yes, sir.

Q. Now, after you had finishel up the work, did you heave on some of the hatches or leave some of them off, what did you do with regard to that?

A. After we finished the work?

Q. Yes.

A. We hove on all hatches with the exception of Number 22 hatch.

Q. At that time was Number 22 all the way off or not, or half on?

A. It was half off.

Q. At that time when you finished heaving all the others on but that half of Number 22, can you tell us whether or not the lights were burning in Number 4 hold?

A. Yes, sir.

Q. What was the occasion of leaving that half of the hatch off Number 22?

A. Half of the hatch was off until we could finish the cleaning of the hold and then we pulled the other half off. The half was simply off to have light in there while we were working in daylight at the time.

192 Q. Did you get any orders from any source with regard to your cargo?

A. Yes, sir, we had orders for to be ready to shift to the dock at any time.

Q. And where did you get that from?

A. From the dock office.

Q. And did you, as second mate, have any connection with regard to this Number 22 hatch, with reference to that preparation?

A. Yes, sir, I did.

Q. Then what did you do?

A. Pulled the other half off so as to have it ready.

Q. Now, when you pulled the other half off were the lights burning in Number 4 hold?

Objected to.

A. Yes, sir.

Q. Did you give any orders with regard to further lights around there?

Objected to.

Q. What was done with regard to further lights there?

A. I ordered two lanterns, one on each side of the hatch.

Answer objected to and motion to strike out the same.

The Court: You may state whether there were two lanterns placed there?

The Witness: Yes, sir, there were.

Q. Now, where were they placed?

A. They were placed one on each side on the top of the hatches.

Q. Were those lanterns lighted?

A. Yes, sir, they were.

193 Q. Were they burning?

A. Yes, sir.

Q. Were there any other lights of the ship in that vicinity?

A. Yes, sir, there were the lights on the forward side of the boiler house.

Q. And what sort of lights are those?

A. Electric lights, 16 candle power, bulbs.

Q. What sort of lights were those lanterns that were put on the hatches, ordinary lanterns burning oil?

A. Ordinary lanterns, cold blast, they call them.

Q. Now, what other steamers were close around there and where were they?

A. The Steamer Wilkinson was lying across the slip from us, lying at the coal loading machine.

Q. And were there any lights burning on her?

A. Yes, sir, all her lights were burning.

Q. Can you say whether or not the lights on the Wilkinson threw any light over on your deck?

A. Yes, sir, helped considerably.

Q. Were there any other lights around there?

A. Yes, sir, all the lights on the dock were burning.

Q. What sort of lights were those?

A. Well, there was five, if I remember right, just large arc lights. There were electric lights also, small electric lights under the pan, and so forth.

Q. Did those light your deck any?

A. Very much so.

Q. What was the condition of the atmosphere, was it clear or foggy or smoky or dusty?

A. It was a very clear night.

194 Q. Any dust coming over around your deck to obscure the vision, from this coal dump?

A. I don't remember which way the wind was blowing, I can't say.

Q. Where were you on your boat after you had finished this work about the hatch?

A. I was sitting up on the port side bridge.

Q. Just sitting in a chair?

A. Just sitting in a chair, that was after supper and after all the work had been completed around the deck.

Q. Was anybody with you?

A. My wife was sitting there.

Q. Was there any coal dust flying around there?

A. No, sir, there was not; if there was I wouldn't have had her up there.

Q. What was the first you learned of this accident?

A. The first I learned of the accident, I heard a noise on the deck and the first mate hollered, "Nell," and I supposed there was something wrong and I went down and went aft to the accident.

Q. When you got back there what was the condition of the lights around Number 22 hatch?

A. They were in the same condition as they were when I seen them last.

Q. And how long before that had you seen your lights?

A. Well, I should judge about an hour and a half, perhaps, or an hour or so.

Q. From where you were sitting up on the bridge or wherever it was forward, could you see these lighted lanterns back on the deck, had you looked back there?

A. No, sir, I did not.

195 Q. I say, could you?

A. Yes, if I looked I could see them, yes.

Q. This hour you speak of is from the time you stopped the work back there until you went back again?

A. Yes, sir.

Q. What did you see, what did you find when you got back there?

A. I found that two men had fallen in the hold.

Q. And what did you do with reference to that?

A. I immediately got them out with the rest of the men around there, as quick as I could.

Q. And they were sent off to the hospital?

A. They were sent off to the hospital, yes, sir.

Q. Did you go down into the hold yourself?

A. No, sir, I did not.

Q. Did you stand on the deck and look down?

A. Yes, sir.

Q. Were the men still down there when you got back?

A. Yes, sir.

Q. Could you see them?

A. Yes, sir.

Q. Plainly, or otherwise?

A. Very plainly.

Q. At the time you hove off the balance of this Number 22 hatch, can you state whether John Wattawa took part in that operation?

A. Yes, sir, all the men were there.

Mr. Eichelberger: That is not what he asked you.

The Witness: Yes, sir, John Wattawa was there and his partner, Joe, as he calls him.

Q. And did they or did they not assist in that operation?

A. They assisted.

196 Q. Now, did they ask for permission at any time that night to go up town?

A. No, sir, I gave orders to the boys to stay aboard, that we would be loading at any minute, to get all the rest they could.
Q. Did you give those orders to John and Joe?
A. Yes, sir, and the rest of the deck hands.
Q. And when did you give that?
A. Immediately after the work had been completed.
Q. After you hove off Number 22?
A. Yes, sir.
Q. Did you know anything about them going up town after that time?
A. No, sir, I did not.

(Adjournment.)

At this point Witness Baizaire stood aside to permit plaintiff to use Dr. JOHN H. WELLS, as witness, who testified to the injuries.

CHARLES R. THRASHER, who testified he had been sailing for from 30 to 35 years.

Q. During that time you have filled all the positions, have you?
A. Yes, sir.
Q. Including the lower positions and all the officers' positions?
A. Yes, sir.
Q. Has that sailing been upon the Great Lakes?
A. Yes, sir, down below, too, I used to sail some down below.
Q. How much on the Great Lakes?
A. Most of the time.
197 Q. Have you been in boats with the steel collapsible hatches?
A. Yes, sir.
Q. And I suppose all the freight boats have hatches?
A. Yes, sir, most all of them.
Q. Now, in the coal loading ports, when you are at the dock, waiting for your cargo, is there any custom on the Great Lakes with regard to having hatches off; just answer first whether there is any custom?
A. It is a custom, yes, in most places.
Q. What is the custom with regard to whether or not you have any hatches off?

Objected to.

Q. Were you lying at the port of Sandusky last year?
A. Yes, sir.
Q. Lay at the Short Line dock?
A. Yes, sir.
Q. What would you say the custom was in that regard in the season of 1913 in Sandusky at the Short Line dock?
A. Why, there is places that is different from others on the lakes, there is places where you are not hurried up and there is not so many boats waiting, that you can leave your hatches on until probably a few minutes before they come to notify you. Sandusky, there is one place where there is always seven or eight boats there. I never

went there last summer when there wasn't. It is always customary when we go in the slip and when a boat is laying in there, it is always customary to pull the hatches off.

198 Cross-examination.

By Mr. Eichelberger:

Q. What line are you with?
A. The Pittsburgh Steamship Company.
Q. Have you signed up for the 1914 season yet?
A. Sir?
Q. Have you engaged to sail with that company this season?
A. Yes, sir, I think so; we are just having our meeting today, that is the reason I wanted to get over there.
Q. Did you work for the Becker line at all?
A. No, sir, I never did.
Q. Never worked for the Valley Steamship Company?
A. No, sir.
Q. You say at the plant at Sandusky there is a rush over there?
A. Yes, sir, frequently.
Q. So there are a great many boats there?
A. Sometimes they don't have all of the coal for some of the boats.
Q. What do you mean, when you get into a slip you take off all your hatches, whether there is another boat loading there or not?
A. Yes, sir, we take them off because they will want you to take your place. As I said before, there are so many boats there that probably this boat will only get part of a load, you understand and they don't want you over there taking hatches off after you get to the dock. They say, "Come over, your coal is here."
Q. You are in a hurry on account of the fact that there are boats behind you waiting to get cargo?
199 A. Yes, sir, the Superintendent, Mr. Hand, keeps them lined up.
Q. The boats behind you wait for your boat to load?
A. Yes, sir; then you are waiting for some other fellow.
Q. When you get in there you take off all the hatches on your boat?
A. It is customary when you get into the slip.
Q. What is your boat?
A. I was in the Mariska last year.
Q. What is she, a wooden hatch boat?
A. Yes, sir.
Q. They are all taken off by hand?
A. They are all taken off by hand.
Q. It takes much longer to take the hatches off by hand than it does by machinery?
A. Oh, yes a little longer.
Q. That is, these telescopic hatches, those boats have machinery equipment?
A. Yes, sir. Sometimes they stick, it all depends. Some of them

have chains and the chains don't work very good. Lots of times you can take the wooden hatches off as quick.

Q. How long would it take you to uncover a hatch on one of those steel boats that have collapsible telescopic steel hatch covers?

A. I should judge about five minutes.

Q. You can open up the whole deck inside of a half an hour, can't you?

A. Well, about 45 minutes, I guess.

200 Q. What are the centers on the Mariska, the width of the hatches on the Mariska?

A. Eight feet.

Q. How many sections are there on each hatch?

A. There is eight.

Q. That is four inch planking, isn't it?

A. Yes, sir.

Q. And those are heavy planks nailed together and there is eight cross sections?

A. Yes, sir.

Q. And the way those are moved, the crew lift them up one at a time and pull them to the side and they do that on each side of the hatch?

A. Yes, sir.

Q. And the custom you observed was to have your crew take off all of those wooden hatches along the whole deck of the boat?

A. We used to take them off.

Q. Open up the whole deck?

A. Yes, sir, leave her that way.

Q. Leave her at the dock with all the hatches open?

A. Yes, sir.

Q. And all the crew on your boat knew that was your custom?

A. They knew the hatches were off.

Q. They would have them all off the minute you got to the dock?

A. Yes, sir.

By Mr. Leckie:

Q. How many hatches are there on the Mariska?

A. She has got nine, I guess.

Q. What boat were you last first mate of?

A. I don't know, I have got to go back.

201 Q. What I am getting at, Captain, is in the large steel boats with the telescopic hatches, you have been in that type, haven't you?

A. Yes, sir.

Q. About how many hatches do they have?

A. About 36, 35, 32.

By Mr. Eichelberger:

Q. You turn out the whole crew, all the deck hands, to lift those hatch covers off, do you?

A. Just four men take those off.

Q. It takes more men to lift those wooden hatches off than it does to lift off the steel collapsible hatches?

A. Well, not necessarily, there is two men have to handle the hooks, to put in the shackles at each end of the hatch and a man to run the engine, that is three; generally four.

Q. Do you uncover your hatches at night or in the evening if you are not going to load cargo until the next morning?

A. Not necessarily, no, sir. If we are in that slip I take them off and leave them off.

Q. That is not the general custom of the lakes, though?

A. No, there is places where you have got to do it and there is other places where you have more time to do it.

Q. But it varies in the different ports?

A. It varies in the different ports, yes, sir.

Q. And Sandusky was peculiar in that respect?

A. Yes, sir, it is.

Q. Now, if you are not going to put on your cargo until after four o'clock in the morning, would you uncover your hatches the evening before, say at eight o'clock in the evening?

202 A. Why, I don't see why—they all know they are off. We have taken them off and left them off.

Q. I am asking what you would do?

A. Yes, sir, I would take them off.

Q. And leave them off?

A. Yes, sir, because you can't tell——

Q. Never mind.

A. I have taken them off and left them off all night.

Q. How long does it take to remove one of those wooden hatch covers on your boat?

A. To remove one hatch?

Q. Yes.

A. It would take probably five minutes, to take one off, less than that.

* * * * * * *

M. A. BAIZAIRE, second mate, continued:

Q. Mr. Baizaire, you took part in getting these men up out of the hold?

A. Yes, sir.

Q. After you got them out of the hold do you recall whether or not you hove that 22 hatch on?

A. Yes, sir, hove it on right away.

Q. What was the reason for that?

A. There was a lot of strangers aboard and some of the rest of the deck hands had been intoxicated and after I found out all that, I put it on.

Q. Was that hatch closed, do you remember, before the ambulance got there?

A. Yes, sir, that was closed.

203 Cross-examination.

By Mr. Eichelberger:

Q. Mr. Baizaire, you were on the stand Friday when court adjourned, were you not?

A. Yes, sir.

Q. Now, you testified on direct examination to Mr. Leckie that you never closed one side of Number 22 hatch, did you not?

A. Never closed one side?

Q. Yes, or that you didn't close that hatch at all, one side of Number 22 hatch?

A. That was while we were working in the hold?

Q. No, now, didn't you say Friday that you left one side of Number 22 hatch open when you closed the rest and then that night you had the men open up the other side of Number 22 hatch?

A. After we got finished work, we did.

Q. Didn't you say that you had never closed 22 hatch altogether?

A. No, sir, I did not; before the fellows went into the hold, I didn't say altogether.

Q. I am asking you now, didn't you say that you closed all the hatches except one half of Number 22 hatch?

A. I did before the accident happened.

Q. Well, didn't you say that you closed all the hatches except one half of Number 22 after they had finished cleaning out the cargo hold?

A. Yes, sir.

Q. And that one half of Number 22 you never did close that day, did you?

A. Not until after the accident had occurred.

Q. After the accident occurred you then closed up the hatches, did you—hatch Number 22?

A. Yes, sir.

204 Q. So Number 22 was closed again that night before you went across the slip?

A. It was.

Q. And you closed Number 22 again that night after this accident so that there wouldn't be anybody fall into that hatch?

A. Yes, sir.

* * * * * * * *

Q. Now, how many men did you have down there to clean up the cargo hold?

A. All the deck hands and the watchman and the boatswain.

Q. They were all right under you?

A. Yes, sir.

* * * * * * * *

Q. Of course, you cleaned up the hold that afternoon, cleaned up the entire hold, did you?

A. Yes, sir.

Q. You say you used all of your crew for that purpose?

A. All the ordinary seamen, that is, deck hands——

Q. About how many was that?
A. Five deck hands, one watchman and boatswain.
Q. So that you had about seven men there?
A. Yes, sir.
Q. Do you know who hoisted up the groceries from the supply boat that night?
A. Why, some of the deck hands; I never paid any attention to that.
Q. You don't know what ones they were?
A. No, I do not.
Q. But some of the men under your charge?
A. Yes, sir.
Q. Do you recall whether it was these two boys who were injured?
A. No, sir, I do not.
205 Q. It might have been them or might have been someone else?
A. Yes, sir.
Q. Whoever was hoisting up the provisions, left the hold for that purpose and you stayed with the other men there?
A. I was on deck, I wasn't paying much attention.
Q. You called two men out of the hold for that purpose, to hoist up the provisions?
A. I gave orders to one of the boys, the boatswain hollered down and sent a couple of men up.
Q. So what you remember as to who was down there at quitting time is merely a general recollection?
A. Yes, sir. The groceries were hauled up in the afternoon; it was after supper that we got finished cleaning.
Q. After you finished work, several of the boys were hoisting provisions?
A. Before we finished work.
Q. Before you finished work?
A. Yes, sir.
Q. Now, do you know how long they took in hoisting up those provisions, or have you any recollection?
A. I would say about 20 minutes.
Q. What I want to know is just whether you remember or not, whether you saw it?
A. No, it usually takes about 20 minutes or half an hour.
Q. So you don't know whether these two boys that were hurt were engaged in that work?
A. No, I do not.
Q. You don't know whether the people that were engaged in that work ever came back in the hold again?
A. Oh, yes, I know that.
206 Q. After they got through hoisting provisions?
A. Yes, sir.
Q. You think they did?
A. I know they did.
Q. Whoever was hoisting groceries?
A. Yes, sir.

Q. Well, now, during the afternoon while these boys were cleaning out the hold, you stayed up forward with your wife?

A. Not all the time.

Q. I don't mean all the time, you would go back there whenever occasion arose?

A. I spent most of my time——

Q. She didn't know anybody on the boat but yourself?

A. That is all.

Q. And you spent all of your time that you could with her?

A. Yes, sir.

Q. Your attention was largely occupied in that quarter?

A. Oh, not necessarily so.

Q. Not necessarily, but naturally?

A. Such attention as I could possibly give, yes, but it didn't hinder me in my work or duties at all.

Q. I didn't intimate that, I mean whenever you could go back up forward you did it?

A. Yes, sir.

Q. Now, you put those men down to work cleaning up the hold and then you sat up forward and later you told one of the boys to get a couple of men out there to hoist up provisions?

A. Yes, sir.

Q. After they got the hold swept out did you order them to close up the hatches?

A. After they got the hold swept up they came up and we closed the hatches up.

207 Q. That was done by your direction?

A. Oh, sure.

Q. And you closed all the hatches?

A. All but Number 22.

Q. That is what I want to get at; as I understand you, you closed all but the one hatch?

A. Yes, sir.

Q. You closed that half way, didn't you?

A. It was partly closed and we pulled the other half off. That left it entirely open.

Q. Well now, you didn't pull that other hatch off until you got word from the captain to open 22 hatch, did you?

A. Well, we were in the operation of the hatches when I got word from the captain.

Q. That was about five in the afternoon?

A. No, sir, it was in the evening, around supper time, I should say 6:30.

Q. Was it before you ate supper or after supper?

A. It was before supper.

Q. You called the men outright after supper and closed all the hatches?

A. Pardon me, I hadn't been to supper yet and we got word there before we went to supper.

Q. You closed up the hatches before you ate supper?

A. Yes, sir.

Q. Except 22 and that was already partly closed?
A. Yes, sir.
Q. Now, word came from the captain to open 22 about eight o'clock did it?
A. No, sir.
208 Q. About what time?
A. Around supper time.
Q. 6:30, about?
A. I should say about 6:30.
Q. To open 22 hatch, so you opened 22 hatch then or after supper?
A. Before supper.
Q. That is, you opened the other half of 22 hatch?
A. Around 6:30.
Q. Now, how many men does it take to open that hatch?
A. Well, it would take at least four men.
Q. It takes four men; what do these four men do, Mr. Baizaire, it takes two men to fasten——
A. It would take one man to handle the auxiliary engine and one man to handle the snatch block on the wing of the vessel, the side of the boat, and one man on each side of the bridle.
Q. And that is all the men you could possibly use in uncovering the hatch, is it?
A. That is all we needed for taking one side off.
Q. If you had more men——
A. Just a minute, will you please?
Q. No, just answer; more than four men in taking one side of that hatch off would be in each other's way, wouldn't they?
A. No, they would not, because we had to pull off the rest of the hatches.
Q. I am not asking about the rest of the hatches, I am asking about taking the hatch off: one man is on each side and one fastens the hook in the chain to slide the hatch off?
A. Yes, sir.
Q. And one man throws in the friction and one man back by the boiler house operates the deck engine or donkey engine
209 that operates the cable along side of the boat?
A. Yes, sir.
Q. And that is all the men that are needed in the process of moving a hatch?
A. For taking off one-half of the hatch.
Q. That is all I understand you had to do with this particular 22, to take off one side?
A. Yes, sir.
Q. So you took off, before supper, the other half of Number 22 hatch?
A. Yes, sir.
Q. Now, you were on deck that night: did you say Friday that the word came from the docks to be ready to move across, that word came about eight o'clock?
A. No, sir.

Q. Do you know what time that word did come?
A. About 6:30.
Q. The word came about 6:30 then?
A. Yes.
Q. As you recall it?
A. About that time.
Q. Do you remember when the second mate came aboard or the first mate, rather?
A. Why, about 7:45, 8:00 o'clock, I guess.
Q. Were you at the ladder when he came aboard?
A. I was on deck, I met him on deck.

* * * * * * *

Q. Now, you have given your best recollection, have you, that you went out at 6:30 to pull off the other half of Number 22 hatch?
A. Yes, the captain gave orders.
Q. Whatever was done, the captain told you to do it?
A. Yes, I got word from the captain.
210 Q. You did what the captain told you?
A. Yes, sir.
Q. You think it was about 6:30 you pulled off the other half of Number 22 hatch?
A. Yes, about that time.
Q. And all the other hatches you left covered?
A. Yes, sir.
Q. Now, what time did this accident occur?
A. Oh, around nine o'clock, something like that.
Q. Then who gave you the orders to close 22 hatch, if anybody?
A. Why, we were all there. I forget who gave the orders.
Q. And whether it was closed, you don't know whether it was the captain or the first mate?
A. No, I don't remember.
Q. You don't know whether you did it of your own accord?
A. I don't know whether I gave the orders.
Q. After those boys were hurt you closed 22 hatch?
A. Yes, sir.
Q. What time did you open 22 hatch again that night?
A. When we got over to the coal dock.
Q. That was about one o'clock in the morning?
A. Somewhere around midnight.
Q. Wasn't it along close to three o'clock in the morning?
A. No, sir.
Q. What time did you go to bed that night?
A. I didn't go to bed that night.
Q. You stayed up all night?
A. Yes, sir.
211 Q. Stayed up on deck all night?
A. Why, quite a little after we got the boys off, and one thing and another, about an hour or so, we shifted over to the dock and I was on deck on duty, I didn't go to bed.
Q. You stayed there until they started to take on cargo?
A. Yes, sir.

Q. What time did they start to take on cargo?

A. As soon as we got over to the dock.

Q. Don't you know they didn't start to load cargo until four o'clock in the morning.

A. Not that I can remember.

Q. Well, then I will ask you this, how long before you started to load cargo did you take off this 22 hatch?

A. Took it off as soon as we got to the dock, took off half as soon as we got to the dock.

Q. As soon as you got to the dock you took off all the hatch?

A. Yes, sir.

Q. Why did you do that?

A. To take on cargo.

Q. Do you know what was the first compartment you filled that night.

A. Number 4.

Q. Number 4?

A. Didn't fill it, put some into it.

Q. You don't fill one hatch up, you put some in one hatch and put some in the others?

A. Yes, sir.

Q. You don't sink the vessel at one end at a time, you try to keep the cargo going in the hold evenly?

A. Yes, sir.

212 Q. So when you really got ready to take on cargo, you opened every hatch on the deck, all the 23 hatches?

A. Pulled off 22 first, then pulled them all off.

Q. Why didn't you open 23 first?

A. Because we don't start in that hatch.

Q. That is right by the donkey engine—you don't put the coal in there until later?

A. Not until later, no, sir.

Q. And that is ordinarily because when you put coal in Number 22 hatch, it pours in, it runs back until it hits the end of the boiler house under Number 22 hatch?

A. Yes, sir.

Q. So that the final part of the loading is to put the coal in the last two hatches, in Number 1 and 23 hatch?

A. Number 1 and 23?

Q. Yes?

A. Oh, sometimes.

Q. In other words, when you are dumping coal in 22, the gravity carries the coal up against the compartment in the front off of the chain locker and it piles in there?

A. Yes, sir.

Q. When you get ready to take on cargo you then open all the hatches?

A. We open them up as soon as we get to the dock.

Q. You open every one of them?

A. Number 22 first, in case we start right away, and which I think we did.

Q. Well, that is your memory, it may be off a little; that is, if you were told by the dock superintendent that you would
213 begin to load at four o'clock in the morning, that would refresh your recollection, would it?

A. I don't think so.

Q. Well, now, your memory that you began loading the minute you got to the dock is as accurate then as any other event of the night?

A. No.

Q. You are not so sure about that?

A. No.

Q. The only thing that impressed itself on you there on that night was the fact that those two boys were hurt?

A. Yes, sir.

Q. And the other stuff sort of fell into the background; when you started to uncover the hatches when you got over across the ship to the other dock, you say you uncovered them all, but how long did it take to uncover all the hatches?

A. Well, it would take as long to take off the first hatch as it would ten others. The idea of working on the engines and running the cables off.

Q. There isn't much difference between taking the forward hatch off?

A. I say there is a difference.

Q. How long would it take to take off all the hatches on that boat?

A. Why, when both machines are working and all the men, take about an hour, three-quarters of an hour.

Q. Three-quarters of an hour, as much as that; that is allowing if the chains don't jam or stick?

A. That is not allowing for any accident at all, no hazards at all.

Q. Tell the jury how you worked your boat across the
214 slip, whether you had power on her that night?

A. We took two heaving lines, a heaving line is a little line as big around as my finger and about 17 fathoms or 100 feet long. We tie the end of the heaving line on the mooring cable, the line that ties up the vessel, and a deck hand pulls the cable over to the other side of the slip and puts it on a spile. That is one forward and one aft, one in the front of the boat and one in the back part of the boat. Then we leave one cable on the other side where we were laying until we get pretty near over there and heave her over. We throw the cables off on the other side of the slip when we are within 24 feet or so of the side we are going to. That is the way we heave her over, always steam.

Q. In other words, you use the donkey engines on the deck to work her, heaving her over?

A. The deck winches.

Q. You never turned her screw that night, never had steam up in the big engine?

A. I don't remember whether we used the big engine or not that night.

Q. You probably wouldn't know if they worked her ahead or backed her around to get her across?

A. I don't think we did.

Q. You don't have steam up on the big engine, do you, had your fires all banked?

A. It is always ready when we get word to shift.

Q. You don't have pressure for the high pressure cylinder to move her?

A. Yes, sure, she is always got to be like that.

215 Q. You are not in the engine room yourself?

A. No, sir.

Q. Did you close those hatches before those boys were taken away, close this one hatch, rather, or right after they were taken away?

A. As soon as we got them on deck we closed the hatches.

Q. Then you kept all the hatches closed until you got to the dock?

A. Yes, sir.

Q. Now, after you got her across the slip it took you some little time to tie her up over there?

A. Yes, sir, takes quite a while.

Q. And then it takes quite a while to get the coal dump started to work to hoisting the coal?

A. No, they are always ready.

Q. That is the process of getting the coal into her, the engine shunts a car down and the brakeman rides the car down under the dump and brakes it and then they elevate it slowly up to a point some distance above the level of the deck and then they throw in the other engine and turn the car practically upside down?

A. Yes, sir.

Q. That takes how long?

A. Oh, they can dump a car in about two or three minutes.

Q. That is, after they get it on the elevator, under the dump?

A. Yes.

Q. But it takes some little time to back the coal in from the yards, doesnt it?

A. There is always coal there. When they send word for you to come over they have got the coal ready there.

Q. On the switches?

A. Yes, sure.

216 Q. But the engine works it in off the switches onto this gravity track and lets it drop down?

A. Yes, but there is always one in the dump, waiting.

Q. There is always an empty in the dump waiting?

A. As soon as the car is emptied it runs out. They wouldn't keep an empty car there, what for?

Q. Doesn't the full car bump the empty one off?

A. Yes, sure.

Q. That is the way they get rid of the engine back here, switch brake, and it runs back from that into the yard?

A. Yes, sir.

Q. About how long does it take to tie her up after you get her across the slip, that is, tie her up to the coal dock, I am referring to the ship?

A. There is no specific time, sometimes tie her up in 15 or 20 minutes, sometimes takes an hour or an half an hour; it all depends on how the wind is blowing, or something like that.

* * * * * * *

SAMUEL NEWMAN, who testified as follows:

Direct examination.

By Mr. Leckie:

Q. What is your name?
A. Samuel Newman.
Q. You were the watchman on the Edwin N. Ohl September 1st?
A. Yes, sir.
Q. When the boat was lying at Sandusky?
A. Yes, sir.

217 Q. You remember the circumstances of two deck hands falling in the hold on the evening of September 2nd?

A. Yes, sir.
Q. What time did you go on watch that afternoon?
A. Six o'clock, about 6:10.
Q. Did you get any orders in connection with Number 22 hatch after you came on watch, some time?
A. Yes, sir.
Q. What was that?

Objected to.

The Court: You got some orders, did you?
The Witness: Yes, sir.
The Court: Tell us what you did.

Q. What did you do in connection with Number 22 hatch?
A. I got orders.

The Court: Following the orders that you got, what did you do, obey the orders, tell us what you did?

Q. What did you do?
A. With the hatches?
Q. Yes, what did you do in connection with the hatch?
A. I opened it up.
Q. Did anybody help you do that?
A. Yes, sir, all the deck hands.
Q. Do you know John Wattawa?
A. Yes, sir.
Q. Was John there helping in the work?
A. Yes, sir.
Q. You also know Joseph Mraz?
A. Yes, sir.
Q. Did Joe help in that work?
A. Yes, sir.

Q. What were the conditions of light aboard the ship at that time?

A. Well, we had the lights, had two lights, one on each
218 side, and the lights on the boiler house.

Q. What sort of lights does the ship have, regular lights?

A. Well, sir, have all kinds of lights, but we had white lights on the hatches.

Q. Were they electric lights or kerosene oil lights?

A. Kerosene oil lights.

Q. Were there any electric lights around there?

A. Yes, sir.

Q. Where were they?

A. Electric lights back at the boiler house near the hatch. The cargo hold was lighted and lights all in the front of the boiler house.

Q. Now, with regard to these kerosene oil lamps, where were they?

A. Right on the side of the hatches, on the top of the tarapaulins.

Q. On the top of the tarapaulin?

A. Yes, sir.

Q. Who put them there?

A. I did.

Q. Were they lighted?

A. Yes, sir.

Q. Burning?

A. Yes, sir.

Q. How high would the tarapaulin be above the hatch covers?

A. Well, it is, I guess, about more than two feet high.

Q. After that were you around the deck?

A. Yes, sir.

Q. Did you see John and Joe when they came aboard later on?

A. I seen them right on the boat.

Q. About what time was that that they came aboard?

A. Well, I guess it was between eight, something like that.
219 Q. Where were you on the deck at the time they came aboard?

A. I was walking around the deck.

Q. Now, about where was the ladder over?

A. The ladder was over about 18 hatch.

Q. Were there any lights on the ladder?

A. Yes, sir, two lights, one down below and one on top of the ladder.

Q. What were those, kerosene oil?

A. Kerosene lamps.

Q. Now, after John and Joe got aboard, what did they do first?

A. They came aboard, they was a little drunk and then he told me, one fellow——

Mr. Eichelberger: What did you say?

The Witness: They came aboard drunk.

Mr. Eichelberger: I move to strike out the answer, that is not an answer to anything that was asked.

The Court: It may be stricken out, but I suppose he can put it in again.

The Witness: I was aboard when they came and they came aboard drunk.

Motion to strike out answer. Answer stricken out.

The Court: Just answer the questions put to you.

Q. What did they do first, I want to get at whether they sat down or walked around when they came aboard?

A. They came aboard and they had a bottle of whiskey in their pocket and they asked me to take a drink, and I told them that I can't take any drink, I am on watch.

220 Q. Where did they go?

A. They walked around the deck and they said they are getting sleepy and they took the tarpaulin off the hatches and made themselves a bed on Number 18 hatch and told me they are sleepy and took their shoes off and laid down and the mate gave me an order——

Q. Wait a minute. Before they said they would lay down and as they were talking with you there, did they stay right in the vicinity or move around some?

A. They were monkeying around, running around.

Q. Now, did you say anything to them?

A. Yes, sir, I did.

Q. As they were running around there, in connection with this hatch?

A. I told them to look out, there was one hatch open.

Q. Did they answer you?

A. Yes, sir, they answered me.

Q. Did John answer you?

A. Yes, sir.

Q. What did he say?

A. He said, "We know it."

Q. And after that was it they laid down there?

A. Laid down.

Q. And where did you go then?

A. I got an order from the mate to sound the boat.

Q. What did you do?

A. I was going back aft to sound the boat and I seen them—

Q. Just tell the jury what sounding a boat means?

A. Water in the boat.

Q. To find out how much water there was?

A. To find out how much water, yes, sir.

221 Q. Where did you go to do that?

A. Well, I was going back aft, right after of 23 hatch.

Q. Just in front of the boiler house?

A. Just in front of the boiler house.

Q. Now, as you were there sounding for water, did you notice anything about John and Joe, and if so, what?

A. They were running around, fooling around.

Q. What occurred then?

A. Then I hollered, "Boys, look out, there is a hatch open."

Q. What was the occasion of your hollering?

A. Well, I seen them run back aft. I said that and he answered, "We know it," and when I said that the little fellow was running before the big fellow and so the little fellow was running right straight and the big one after him and the little fellow fell in and the big one right after him.

Q. Now, at that time that they ran into this hatch, what was the condition of the light?

A. The lights?

Q. The lights around the hatch?

A. They was right where they were before.

Q. And whereabouts did they fall, with reference to any of those lights on the hatch?

A. About two feet, I guess, from the lights.

Q. Two feet from those lanterns?

A. Yes, sir.

Q. Were those lanterns lighted and burning at that time?

A. Yes, sir, lighted and burning.

Q. Were the lights forward of the boiler house burning at that time?

A. Yes, sir.

222 Q. Were the lights in the cargo hold burning at that time?

A. Yes, sir.

Q. What did you do then?

A. Then as soon as I seen them fall down I ran up on the deck and hollered to the first mate who was sitting up forward, and I hollered down that two fellows fell in the hold.

Q. Then where did you go?

A. I went right down, I had a lantern in my hand, I had to see to sound the boat, and I went right down and picked up the big fellow.

Q. You went down into the hold?

A. I went down into the hold and there was some water in the hold of the boat. I picked the big fellow up; he hollered out, "Let me go," but in the meantime another fellow came down and I picked up the little fellow and he didn't answer at all. About that time they let ropes down and we got them all on deck.

Q. Then you sent them off to the hospital?

A. I guess the first mate went down for the ambulance.

Q. At the time that they first came aboard there, you say they offered you a drink out of a bottle?

A. Yes, sir.

Q. Could you tell anything about their condition as to whether they had been drinking or not?

A. Yes, sir, they were drinking.

Q. When they offered you a drink, do you know whether they took a drink at the time they had the bottle out; did they themselves take a drink?

A. Certainly, both of them took a drink.

223 Cross-examination.

By Mr. Nord:

Q. You say your name is Samuel Newman?
A. Yes, sir.
Q. What other names have you?
A. That is all, just two names.
Q. Where do you live?
A. Detroit.
Q. What do you do over there?
A. Working.
Q. What do you do over there?
A. Driving.
Q. Driving what?
A. Furniture wagon.
Q. For what company?
A. Robinson & Kohn Furniture Company.
Q. Have you intended to ship on the lakes this summer?
A. To go this summer, I don't know yet.
Q. Did you ever go before last summer?
A. No.
Q. That was your first year?
A. Yes, sir.
Q. What month did you ship?
A. Well, I shipped, I guess it was in April, I guess.
Q. April?
A. Yes, sir.
Q. That was your first experience?
A. Yes, sir.
Q. Now, you call yourself Murphy, don't you?
A. They just named me Pat Murphy; my real name is Samuel Newman.
Q. Didn't you go around there under the name of Murphy all the time?
A. They used to call me, I guess the mate did, I don't know who it was, maybe because I am a Jew, see, and there was no Jews on the boat only me, so they started to call me Murphy.
224 Q. You didn't give yourself that name?
A. I gave my name—they had my name in there.
Q. You gave your name as Newman?
A. Samuel Newman.

* * * * * * *

Q. That night, as a matter of fact, didn't you get dressed and go up town right after supper?
A. No, sir, I was on watch.
Q. Were you on watch all that evening?
A. From six o'clock until twelve.
Q. Weren't you up town that evening at all?
A. No, sir.
Q. Are you sure of that?
A. Sure.

Q. When the policemen came aboard that night, did you see them?

A. Yes, sir, I seen them down below when the accident happened.

Q. Did you see them on the boat that night?

A. I seen policemen there.

Q. Did you go with the policemen to where those boys were?

A. No, sir.

Q. Did you show the policemen where those boys were on the boat?

A. No, I didn't see them. When they came up on the ladder, they was lying on the hatches.

Q. Who showed the policemen where those boys were after they were taken out of the hold?

A. They seen them themselves, seen them lying on the hatch.

Q. You don't know who met the policemen at the ladder, do you?

A. I guess the mate. As soon as the accident happened
225 the mate went for the ambulance.

Q. Answer my question. Do you know who met the policemen at the ladder?

A. I don't know who met them.

Q. Now, was anybody on the deck of the boat that night besides yourself when those boys came aboard?

A. Oh, well, the only man was myself, I was walking around the deck.

Q. You were the only man on the deck when those boys came aboard that night?

A. Walking around.

Q. Were you carrying a lantern with you?

A. Yes, sir.

Q. Walking around carrying a lantern?

A. Walking around carrying a lantern in my hand.

Q. Were you working cleaning out the cargo hold that afternoon?

A. I was working in the morning.

Q. You slept until six o'clock, did you?

A. I am working from six to twelve, in the morning; six to twelve at night.

Q. That was your watch, from six to twelve?

A. From six to twelve.

Q. And you came on watch at six o'clock?

A. Yes, sir.

Q. Now, had the hatches been closed up at that time?

A. Yes, sir.

Q. All had been closed at that time?

A. Yes, sir.

226 Q. Was Number 22 hatch open when you came on watch at six o'clock?

A. At night?

Q. Yes, sir?

A. At night the hatches were open.

Q. At six o'clock when you came on, were all the hatches open.

A. Yes, sir.
Q. All of them on the deck?
A. Well, the sides of them.
Q. Did you help close them up?
A. Yes, sir.
Q. How many did they close?
A. Closed all of them, but we left Number 22.
Q. Left 22 open?
A. Yes, sir.
Q. Was that all open or just half open?
A. It was all open.
Q. But closed all the rest of them?
A. Closed all the rest of them.
Q. Was there tarpaulins piled up beside the hatches?
A. No, just covered up.
Q. Tell the jury what a tarpaulin is?
A. A tarpaulin is that kind of a cloth so the water couldn't get in the cargo hold.
Q. That covers all the hatches?
A. Yes, sir.
Q. When the hatches are open it is rolled up in a pile?
A. It is rolled up in a pile.
Q. And lays between the hatches?
A. Lays on the side of the hatches?
Q. On the side or at the ends?
A. At the side.
Q. And you had tarpaulins all along the deck there?
A. Yes, sir.
227 Q. Where were the tarpaulins on the hatches that were covered?
A. Laying on the side, a couple on the port side and a couple on the starboard side.
Q. Now, what time did they get through closing up those hatches?
A. Well, we got through, I guess, as soon as I came out from supper we started to work, and it takes five or ten minutes to close all the hatches.
Q. Close all of them in five or ten minutes?
A. Yes, sir.
Q. How many men were working at that time?
A. Five and me, was six.
Q. Six of you, you closed all the hatches in five minutes?
A. Yes, sir.
Q. How long does it take to uncover all the hatches?
A. The same time.
Q. How long does it take to uncover one hatch when there is no tarpaulin on it?
A. Not even a second.
Q. Don't take as much as a second to uncover a hatch without a tarpaulin?
A. Yes, because there is two machines working, both sides, one pulls this side and one this side.

Q. Do you know how long a second is, do you mean a second?
A. As soon as you put it on, it comes off in a minute.
Q. You say a minute or a second?
A. I wouldn't know, a minute or a second.
Q. Is it as much as a minute?
A. As much as a minute, yes, sir.
228 Q. About a minute?
A. Yes, sir.
Q. You uncovered the whole 23 hatches in 25 minutes?
A. Yes, sir.
Q. Did you see those two boys about there?
A. Yes, sir.
Q. Weren't you all dressed up and going up town at the time they went up?
A. No, sir.
Q. Now, as a matter of fact, wasn't the only time you saw them that night when they were coming up town and you were coming up town?
A. I wasn't coming up town at all, I was on watch, I couldn't go up town. I was up town in the afternoon.
Q. You didn't go up town?
A. In the afternoon I was up town.
Q. Weren't you all dressed up at 6:30, waiting to go up town?
A. No, sir, I was on watch.
Q. Were you drinking in the afternoon?
A. Nothing at all.
Q. Weren't you over to Cedar Point?
A. I was over to the Point, but I didn't drink nothing.
Q. All Tuesday afternoon you were over to Cedar Point?
A. Yes, I was over for a good time.
Q. What do you call a good time?
A. Go out and have a good time, walking around.
Q. There is lots to drink over at Cedar Point?
A. I don't drink, I ain't allowed to drink.
Q. You got back to the boat about what time?
A. I got to the boat about five o'clock or a little after five.
229 Q. What time did it get dark that night?
A. I guess about six o'clock.
Q. Got dark at six o'clock?
A. Yes, I don't remember for sure when it got dark.
Q. Well, if it got dark at six, what time did you have supper there?
A. I didn't have any supper that night. The cook was up town the only thing he left was some lunch, ham, bread and coffee.
Q. Weren't all the crew out that day over to the Point?
A. The whole crew wasn't at the Point.
Q. Most of them were over to the Point that afternoon?
A. A few of them.
Q. Who were over there?
A. I don't remember the names.
Q. Were any of the officers over to the Point that afternoon?

A. Oh. yes.
Q. Who?
A. From the boat?
Q. Yes?
A. Nobody.
Q. None of the officers of the boat?
A. No, sir.
Q. Did you see the other watchman over there?
A. No.
Q. Now you got back from Cedar Point about five o'clock, you think?
A. Yes.
Q. And then did you cover all these hatches before supper or after supper?
A. After supper.
Q. After you ate your supper and you ate about six o'clock?
A. Yes.
Q. That is, you ate supper, it was dark when you went in to eat supper?
A. Just a little bit dark.
230 Q. When you came out from supper it was dark?
A. It wasn't so dark.
Q. It was getting very dark?
A. It was getting dark, it wasn't dark.
Q. Dark so you had your lantern lit?
A. Not then.
Q. When you started to cover up the hatches it was getting dark?
A. Yes.
Q. You think it was only about 25 minutes while you were covering all these long hatches?
A. Yes, sir.
Q. Then you think it would take about a minute longer to cover up 22 hatch?
A. No.
Q. You didn't cover that up?
A. No, I had the order from the mate to leave it open. We had to shift over to the dock.
Q. I am asking you whether you think it would have taken another minute to cover up 22 hatch?
A. Yes.
Q. Now, you didn't cover that up?
A. No, sir.
Q. You stayed on watch until midnight?
A. Yes, sir, until twelve o'clock.
Q. You went to bed at midnight?
A. Twelve o'clock.
Q. Had they moved when you went to your quarters to sleep?
A. Yes, sir.
Q. Don't you know they didn't move across there until about one o'clock in the morning?

A. Moved just at midnight.

231 Q. Do you know what time they started to take cargo?

A. I don't know, I was sleeping at that time; took cargo somewheres around two or three o'clock. I was sleeping at that time.

Q. You don't know whether it was two o'clock or five o'clock?

A. When we started to take cargo I don't know, I was sleeping.

Q. Now then, there was some deck hands that came on on the six o'clock watch, did they, the deck hands?

A. When, at night?

Q. Yes?

A. The deck hands don't work at night. If there is anything to do they have got to do it.

Q. It takes how many people to close and uncover the hatches?

A. What do you mean, how many people?

Q. Yes?

A. Supposed to be two on the machine and then supposed to be four, three fellows.

Q. Three fellows altogether?

A. Yes.

Q. Altogether?

A. And three on the other side.

Q. Three on one side and three on the other?

A. Yes, sir.

Q. What did you do about covering the hatches, what was your work?

A. My work, just going on to signal them to turn the wire.

Q. Signal the engineer?

A. Yes, sir.

Q. Who were the other men who were working to cover those hatches?

A. I don't remember the names of them.

232 Q. Do you remember which ones they were?

A. The deck hands, I know.

Q. You say you think those two boys worked?

A. Yes, sir.

Q. Are you sure about the other two, how many other deck hands?

A. There was five deck hands.

Q. Do you remember whether the other three worked or not?

A. Certainly.

Q. All five worked?

A. All three. All five of them.

Q. Now, as a matter of fact, don't you know these boys sat down after supper and wrote letters to their families?

A. They did not.

Q. Did you see them when they went ashore?

A. I didn't see them going down, when I was working on the boat I didn't see nobody.

Q. Do you know what time those boys came aboard the boat?

A. It was about eight o'clock or a little after eight.

Q. Eight or half past eight?

A. Something like that.
Q. What time were they hurt?
A. I guess about nine o'clock.
Q. Did you go down to talk to them at all?
A. Who?
Q. These boys?
A. When they came aboard?
Q. Yes?
A. Certainly I did.
Q. Which boy did you talk to?
A. Both of them.
233 Q. You talked to both of them?
A. Yes, sir.
Q. Did you talk to the boy with his leg off?
A. Yes, sir.
Q. How long did you talk to him?
A. Just a minute. I told him he should look out, the hatch is open, and he says, "Yes, we know it."
Q. He told you that in English?
A. Not in English.
Q. How did he tell you?
A. I was talking to him in Polish, I could understand him all right.
Q. He talked to you in Polish?
A. He talks Bohemian, I guess, but I could understand him all right.
Q. You know if he understood you?
A. I don't know, I guess he did.
Q. And you told him to look out, there is a hatch off?
A. Yes; he said, "We know it."
Q. Did you tell everybody that came aboard that there was a hatch off?
A. Yes, sir.
Q. Did you stay at the ladder for that purpose?
A. I did not, I said I walked around.
Q. But anybody that came aboard, you told them?
A. A sailor knows how to walk on a boat, he knows himself.
Q. An experienced sailor would know how to walk on a boat?
A. Yes, sir.
Q. And you told these boys because they were greenhorns?
A. Certainly, they seen it, too, and they helped take it off, and knew it.
234 Q. You told them to look out for the hatch because they weren't experienced sailors?
A. Yes, sir.
Q. You knew that?
A. Yes, sir.
Q. They were greenhorns?
A. Yes, sir.
Q. You think this boy understood you when you spoke to him in Polish?

A. Yes, sir.
Q. How long have you lived in this country?
A. About a couple of years.
Q. You came from Poland to this country?
A. Austria.
Q. Did you see anybody else come aboard that night except these two boys?
A. Nobody else.
Q. Was there any other deck hands ashore?
A. All of them.
Q. All of them?
A. Yes, sir.
Q. Everybody was ashore that worked there except yourself?
A. The mate was aboard, the captain was aboard. The first mate was up home and he came back that night, came aboard.
Q. What time of the day did he come aboard?
A. Before the accident happened.
Q. Did you see him when he came aboard?
A. Yes, sir.
Q. Did you tell him?
A. I didn't tell him anything, he came aboard and went up forward.
Q. Did you tell him the hatch was off?
A. He knew it.
Q. Did you tell him the hatch was off?
A. I didn't tell the mate nothing.
235 Q. Did you tell anybody else that night that the hatch was off?
A. Everybody seen it was off.
Q. Wait a minute, did you tell anybody else that came aboard that night to look out, that the hatch was off?
A. Nobody else came aboard.
Q. They were the only ones, except the mate, that came aboard?
A. Yes, sir.
Q. And you told them the hatch was off; why did you tell them, because you thought they didn't see it?
A. They came aboard and I seen they were drunk, that is why I told them.
Q. You say they were drunk?
A. Yes.
Q. Were you ever drunk?
A. No, never was drunk.
Q. What did they say to you when they came aboard?
A. They said, "All right, we know it."
Q. They understood what you were saying?
A. Yes, sir.
Q. You understood what they were saying?
A. Yes, sir.
Q. They didn't have any trouble coming up the ladder and climbing aboard?

A. I didn't see how they climbed the ladder, I seen them when they came on deck.

Q. How close were you to them?

A. Not very far away.

Q. Did you smell their breath?

A. Certainly.

Q. Did you smell the odor of beer on their breath?

A. They had a bottle in their pocket, too.

Q. How big a bottle?

A. About a pint big, I guess.

236 Q. How big, describe to the jury?

A. (Indicating.) A bottle about so big.

Q. Who had that in his pocket?

A. The big fellow had it.

Q. The big fellow?

A. Yes, sir.

Q. Did you find that bottle after they were hurt?

A. I think they found it.

Q. Was it broken?

A. I guess so.

Q. You smelled their breath; they sat down on the hatch?

A. Yes, sir.

Q. Do you know whether they were smoking?

A. I guess they was smoking.

Q. Do you know what they were smoking?

A. No.

Q. Do you know what they were doing when they were sitting on the hatch?

A. They were sitting, talking to one another and they told me they are going to sleep on the hatch and they took another tarpaulin from another hatch and put it on Number 18 and told me they was going to sleep. And they took their shoes off and laid down.

Q. As a matter of fact, when they were taken out of the hold, both of them had their shoes on, didn't they?

A. They had their shoes off.

Q. When they were taken out, didn't they have their shoes on?

A. No, sir, no shoes on. I will swear fifty times they never had any shoes on.

Q. You will swear fifty times?

A. Yes, sir. We found their shoes in the morning between 18 and 19 hatches.

237 Q. Where did you sleep?

A. Right in my room.

Q. Didn't you have a bed up on the hatch that night?

A. No, sir.

Q. Didn't you take a bed up outside?

A. Not that night.

Q. Did you at any other night?

A. When it was warm I used to sleep on the hatch.

Q. Was it warm that night?

A. Oh, certainly.

Q. A very hot night?
A. Yes, sir.
Q. You didn't sleep that night on a hatch because they were loading coal?
A. I was sleeping right in my room.
Q. You wouldn't sleep when they were going to load coal on the deck anyway?
A. On my watch?
Q. Yes?
A. Why, certainly, if I am on watch I can't sleep.
Q. They were going to load coal some time during the night?
A. After I get off at twelve o'clock I am going to bed right away.
Q. Did you have any other conversation while they sat there talking, to tell them the hatch was open?
A. I told them fellows, I told them that the hatch was open. It was open and they knowed it themselves.
Q. They said they knew it?
A. Yes, sir.
Q. Did you have any other conversation while they sat there?
A. No, sir.
238 Q. Then you went up to the other end of the ship?
A. Then I went up to the other end of the ship.
Q. Where were you when they got hurt?
A. Call it Number 24 hatch.
Q. You were down there at the stern of the ship?
A. Right near the boiler house.
Q. But that is the only talk you had with them that night?
A. I had some more talk with them when I was going back after I had the order from the mate to sound the boat and I seen them jumping up and fighting around and I was hollering, "Look out, the hatch is open," and he answered, "We know it."
Q. Who answered you?
A. Both of them, and then——
Q. Now, wait a minute; did you have any other talk with them besides that?
A. No, sir.
Q. That is the only talk; so that the only talk you had with them that night at all was twice you said that the hatch was open and twice they answered you, "We know it"?
A. Yes, sir.
Q. That was the only talk you had at all that night with them?
A. Yes, sir.
Q. Now, you say you smelled beer on their breath, did you; how near were you to them?
A. I wasn't far away from them.
Q. Now, Mr. Newman, what time was it when they closed that Number 22 hatch that night?
A. Right after the accident.
239 Q. They closed it right up after the accident?
A. Yes, sir.
Q. And it was opened again before you went to bed?
A. Before I went to bed, no.

Q. It was closed the rest of the night?
A. When we shifted over to the dock.
Q. All that night until you went to bed, from say nine o'clock until twelve, the hatch was all closed?
A. Yes, sir.
Q. You didn't go to bed until they made the shift?
A. Well, we made the shift and I left them right in the middle of the shift, at twelve o'clock. I left in the middle of the shift and the other partner took my place.
Q. Was 22 hatch closed at all that evening until nine o'clock?
A. Closed?
Q. Yes?
A. No.
Q. Did you open it up or was it open?
A. It was open.
Q. Open that afternoon?
A. Yes, sir.
Q. Was it half open?
A. Opened altogether.
Q. It was all open all that afternoon?
A. Yes, sir.
Q. And no part of it was closed at all that afternoon?
A. No, sir.
Q. They never shut the hatch, any part of it, until nine o'clock?
A. Until after the accident.
Q. You think the accident occurred about nine o'clock?
A. I think so.
240 Q. And you think shortly after that they closed it?
A. About nine o'clock.
Q. When you walked around the deck you carried a lantern with you wherever you went?
A. Yes, sir, I carried a lantern.
Q. You saw the policemen come aboard?
A. Yes, sir, I did.
Q. Now, there wasn't any change in the lights of any kind from the time of the accident until the policemen came aboard, was there?
A. No, no change at all in the lights.
Q. Was this a dark night?
A. Well, it wasn't so dark.
Q. Was it a moonlight night?
A. I guess it was a moonlight night, I think so, I can't remember.
Q. You don't remember whether it was or not?
A. I think it was a moonlight night.
Q. Was the moon up or down at nine o'clock?
A. It was up, I guess.
Q. At nine o'clock, you think there was a moon there?
A. I think so, I can't remember for sure.
Q. Well, do you know anything about it or are you just guessing at it?
A. Well, I can't tell you that, whether it was.

Q. If you don't know anything about it, say so?
A. Well, just what I say, I don't know, I don't remember.

241 THOMAS E. JULIN, who testified he was boatswain of the Ohl; that he remembered the men falling into the hold.

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Q. Do you remember whether or not Number 22 hatch was open?
A. It was, sir.
Q. How long before the accident, we will say, had you been along there?
A. Well, we had been working around there all afternoon.
Q. Now, what was the last time that you saw that hatch open, as you went along there, how long before the accident, what I am getting at is, was it five minutes, ten minutes or a half an hour?
A. I don't think more than about fifteen minutes; it might have been an hour, though.
Q. What was the condition of the lights back there at that time, were there any lights there and if so, what?
A. Yes, sir.
Q. What lights?
A. There was one light on each side of the hatch, on top of the hatches that was piled up on the end of the hatch, and also I took a look in the hold and the lights were in the hold and there was also lights on the forward side of the boiler house.
Q. Now, were all those lights burning?
A. Yes, sir.
Q. Now, where were you when you first learned about the accident?
A. I was in my room at the time.
242 Q. What were you doing in your room?
A. I was just lighting up my pipe at the time and I was going to bed.
Q. What did you do, did you go back there immediately or what?
A. Yes, sir, the first mate hollered in, "Two men in the hold," and I ran right back there.
Q. How did you find the lights when you got back there?
A. I looked down in the hold and saw the lights in the hold and went down in the hold.
Q. How about those lights on the hatch, were they there?
A. Yes, sir, they were there at the time.
Q. And the lights forward of the boiler house, were they still burning?
A. Yes, sir, right there, certainly.
Q. And you helped one of the men that went into the hold and helped work in the hold?
A. Yes, sir.
On cross-examination he testified:

* * * * * * *

Q. What had you been doing on the afternoon, if you remember?
A. We had been cleaning up the hold that afternoon.

Q. What time did you get through cleaning up the hold?
A. Well, just about supper time.
Q. Who was helping you clean up the hold?
A. The watchman and the deck hands.
Q. Do you remember those two boys that were hurt?
A. Yes, sir.
243 Q. Do you remember that they were called out to pull up groceries that afternoon before supper?
A. I can't just exactly say who the boys were, but I know two of them went, one of them anyway, had to go back and help with the groceries.
Q. One or two may have been used to pull up groceries?
A. Three, I think, one, two or three, I can't positively say.
Q. At least somebody went back to pull up groceries?
A. Yes, sir.
Q. And that somebody wasn't yourself?
A. No, sir.
Q. You don't recall who it was?
A. No, sir, not at the time.
Q. And that was just before supper?
A. Yes, somewhere in the evening.
Q. These supply boats come out with supplies about your supper time?
A. Generally about meal time, yes, sir.
Q. Now, when you came out of the hold it was nearly supper time?
A. Yes, just about supper time.
Q. What time was supper that night?
A. As it always is, a quarter of six.

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Q. The only person that cooks the suppper there is the cook, if you had a hot supper; now, before you had supper, did you close up those hatches?
A. We closed up some of them, yes, sir.
244 Q. How many of them did you close up before supper?
A. I don't know how many we got closed. I know we left one hatch open.
Q. You closed all but one?
A. Yes, sir.
Q. Did you do that before or after supper?
A. I think it was just about supper time.
Q. Well, I know, was it before or after you had supper?
A. It isn't so very long ago, but pulling those hatches on and putting them on so many times, I can't just recall that certain time, if it was before or after. Might have been before or might have been after, for all I can remember.
Q. Did you close them all but the Number 22 hatch?
A. We certainly did, yes, sir.
Q. Wasn't that at one time partly closed and didn't you pull it open again?

A. Yes, sir, I think we pulled that 22 out altogether, if I can remember right.

Q. Well, while you were down there in the afternoon she was half closed?

A. I can't just exactly state how that hatch was, but I remember I got hold of the bridle and slung down on the starboard side; that is all I can remember, so we had to pull at that hatch.

Q. So it was open?

A. Yes, if it was fully closed or half closed, how it was, I can't just exactly tell.

Q. What time was it that you opened that?

A. It was around supper.

245 Q. Was it getting dark?

A. Yes, sir, it was, because if not, we wouldn't need the lights in the hold; they were turned on.

Q. The lights in the hold were turned on at the time you pulled this open?

A. Yes, sir.

Q. Did you see these boys after supper that night, these two young men?

A. No, not before the accident.

Q. But afterwards?

A. After the accident I found them in the hold.

Q. Were you on deck at all after supper?

A. Well, yes, walking up and down.

Q. Did you see anybody on the deck?

A. The watchman around there.

Q. Who was the watchman at that time?

A. I don't remember his name, but I know he was a Jew.

Q. These lights you speak of were what, around the hatch, were what kind of lights?

A. Lantern lights.

Q. Kerosene lanterns?

A. Yes, sir.

Q. Just hand larnterns?

A. Just hand lanterns.

Q. Was the deck dark that night, was it a dark night that night?

A. Well, yes, it was in one way, it always is in the fall of the year.

Q. How long does it take to take off these hatches?

A. All of them?

Q. Yes?

A. I guess it can be done in a half an hour if you get any kind of deck hands.

246 Q. When did they open the hatches for taking the coal on?

A. You mean at that time?

Q. That night?

A. We had one hatch off so we could start to load as soon as we came under.

Q. You closed it right after the accident, as I understand?
A. Yes.
Q. Now, when did you open the hatches that night, before you went to bed or afterwards?
A. Afterwards.

* * * * * * *

Q. Had the vessel moved across the slip before you went to bed?
A. No.
Q. You went to bed about midnight?
A. I went to bed just about nine or ten o'clock, somewheres around there, a little after the accident I went to bed. I didn't stay up.

PETER A. RIVERS, who testified he was marine engineer and had been for 17 years, and was chief engineer of the Ohl.

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Q. How many men are on watch, what are the watches in the engine room department?
A. Why, there is four men in the engine room and three in the boiler room, two engineers and two oilers, three firemen.
Q. What watch did you have as chief engineer?
A. Commonly called the first watch aboard the boat, from six to twelve.
247 Q. In the afternoon or evening?
A. Morning and evening.
Q. Do you have men on watch in the engine room, with you?
A. I do, myself and oiler.
Q. Do you remember the circumstances of a couple of men falling into the hold in Sandusky last September?
A. I do.
Q. Were you on that boat at that time?
A. I was.
Q. Who was on watch in your department?
A. Myself and the oiler.
Q. What work was going forward in your engine room, what machinery was operating?
A. Just the dynamos were running, to furnish light for the boat.
Q. Were you in and about the engine room yourself?
A. I was.
Q. And up on deck at any time?
A. Yes, sir.
Q. How many dynamos did you have?
A. Two.
Q. And how are your lights handled, where are they handled from?
A. All handled from the engine room, a common switchboard.
Q. How are the lights in the cargo hold handled, where from?
A. They are handled from the engine room on a switchboard, a switchboard for each compartment of the ship.

Q. Now, how are the deck lights handled, by a switch from the engine room, too?

A. They are.

248 Q. And do you know whether or not the deck lights and the lights in Number 4 compartment were burning on that evening?

A. They were.

Q. How do you know that, Chief?

A. Because I was there and it is my duty to know. The dynamo was running and it wasn't running for nothing.

Q. Do you know whether your switches were thrown in in the switchboard for this place?

A. They were.

Q. Before the accident happened had you been up and around the deck aft and forward of the boiler house?

A. I had been all evening.

Q. Did you notice whether any hatches were open?

A. One.

Q. Now, tell us whether the lights of that cargo hold were burning at that time that you were up and around the deck?

A. They were burning.

Q. How about the lights forward of the boiler house, the deck lights?

A. They were burning.

Q. Where did you first learn of the accident, where were you when you found out about the accident?

A. I was sitting in my room, reading a paper.

Q. How did you find out?

A. The oiler told me.

Q. What did you do then?

A. I went out on deck.

Q. Did you go up to the scene of the accident?

A. Went up to the scene of the accident.

Q. What lights were burning there then?

A. Why, just the same as had been burning all during

249 the evening, lights in the hold, the cargo hold and around the deck on the boiler house.

Q. Did you see any ordinary ship lanterns there?

A. Yes, sir, there was. There was a lantern, I noticed earlier in the evening, on each hatch, on each end of the hatch.

Q. Were the men still in the hold when you got up there?

A. They were hauling one of them out when I got there.

Q. And the other man was still down there?

A. The other man was still down there.

Cross-examination.

By Mr. Eichelberger:

Q. Mr. Rivers, when the hatches are on, you don't burn the lights in the hold at all?

A. No.

Q. You can regulate each compartment with a switch for each compartment?

A. Yes, sir.

Q. And you light a compartment when you learn from some source that one of the hatches of that compartment is off at night?

A. Generally somebody comes to the engine room to notify us whether they want the lights or not.

Q. You only light up such a compartment as the hatch is off of, that is, to throw light down into the hold?

A. That is according to what orders they get.

Q. That is what those lights are down there for, they are under the edges of the deck to throw the light down in the hold?

A. That is it.

250 Q. And the ordinary purpose and use of those lights is for the people loading cargo in the hold to see what they are doing, how the cargo is trimming?

A. Yes.

Q. That is the only purpose of those lights, is it not?

A. I suppose that is what the lights are put there for, to aid in working cargo.

Q. You were led to believe they would work to put in cargo in that hold—you switched those lights on under the impression that they were going to put cargo in that compartment that night?

A. We switched the lights on according to the order that comes from the deck department.

Q. You are an experienced man, you had been sailing the lakes a great many years?

A. About twenty years.

Q. And the lights on a boat at night may mean one thing to an experienced seaman or navigator, that wouldn't mean anything to a man inexperienced on the deck of a vessel, you get my point?

A. Just repeat the question again?

Q. I say, the lights that are burning aboard ship at night have a certain definite meaning to an experienced sailor or seaman?

A. I don't know whether the light aboard of a ship has any more definite meaning than a light burning anywhere else.

Q. Take as an illustration, the lights at the masthead, they mean one thing to a navigator?

A. Oh, yes.

Q. And don't mean anything to a landsman; to one per-

251 son they are signals and to another they are just lights?

A. Yes, with regard to the masthead lights.

Q. That is true with regard to the lights on the deck, too, isn't it?

A. The lights are there to furnish light to see to move about.

Q. It was pretty dark on that deck that night, wasn't it?

A. Not unusually so, no.

Q. In walking about the deck that night and the condition of those lights, you walked very carefully yourself, didn't you?

A. Myself, I always know where I am going.

Q. You are pretty careful about going out on deck when you know one of the hatches are off?

A. Speaking for myself, I always look to see where I am going.
Q. That is why you are still living, healthy and hearty?
A. Maybe so.
Q. Now, do you recall what time you turned the lights on in that compartment at Number 4?
A. Why, the dynamo had been started, I couldn't say what time, might have been in the neighborhood of five o'clock in the evening. That time of the year it gets along toward dusk. Well, aboard ship it is the rule to start the dynamo, the lights to furnish signal lights especially, at sundown. And runs from sundown to sunrise, generally. That is the rule. But I couldn't say whether it was started that evening, while we are in port at sundown, but I would say before five o'clock.

252 Q. When did you switch the lights on in the cargo hold?
A. When I got on watch, after supper, the lights were burning throughout the ship in all the cargo holds.
Q. Why were they burning in the other cargo holds?
A. I suppose they were working, cleaning the hold out.
Q. Were they all open?
A. Yes.
Q. Now, as you closed the cargo hold up you turned off the lights, that is true?
A. Some of the lights.
Q. You remember what time that night you closed off the lights in Number 4 compartment?
A. Didn't close them off any in Number 4 compartment at all.
Q. You left them burn all night?
A. Yes, sir.
Q. Did you know they closed the hatch right after this accident?
A. Yes, they did close the hatch. I was on deck at the time they closed it.
Q. They closed the hatch?
A. Yes, sir.
Q. When they closed the hatch did you *let* the lights burning just the same?
A. I believe we did, probably through the excitement, I don't remember switching them off.
Q. Through the excitement; that is not the custom of the boat; the minute the hatch is on you turn off the lights?
A. If they don't come down and notify us from the deck, we don't know.

253 Q. But you don't recall whether you turned off the lights when they put on the hatch, whether you turned off just three compartments?
A. We did shortly after supper or sometime during the evening. They said they were through with the lights in Number 1, 2 and 3 compartments.
Q. But you left it burning in 4?
A. Left it burning in 4.
Q. You think you left it burning in Number 4 all night long?
A. I rather think we did.

Q. That was a mistake, of course, in wasting that light; you never do that when the hatches are on?

A. Sometimes they burn in the cargo hold with the hatches on.

Q. But you don't often allow that?

A. Not often—well, it is not for us to say.

Q. It is for the captain?

A. For the captain.

Q. You think perhaps that night, owing to the excitement of these men falling in, you kept the lights burning in the compartment all night?

A. I rather think we did, because it was shortly afterwards that they used them in all compartments.

Q. Mr. Rivers, when the light is burning down in the compartment, you can, by going up and looking down into the cargo hold, tell that that light is burning down there?

A. Yes, sir.

Q. Because you can see the bottom?

A. Yes, sir.

Q. The bottom is of a color just like the deck, the same material and same paint?

A. It is iron, bare iron.

254 Q. But you can tell that the light is burning when you get right up and look down?

A. Oh, yes.

Q. You can't by looking down the deck of the boat tell which hatch is uncovered, by the light?

A. You can from a short distance.

Q. You are trained to observe lights aboard a boat, are you, that is part of your business?

A. That is a part of my business.

Q. You are trained to observe them, but to an inexperienced man, those lights are not as observable until he gets right up to the open hatchway?

A. An inexperienced man could, if he was walking along towards the hatch and if the lights were burning in the hold, he could see the reflection.

BEN FRANKLIN stated he was oiler on the Ohl on the night of the accident.

* * * * * * *

Q. Were you the oiler on watch with the chief engineer in the engine room, on the forward watch?

A. Yes, sir.

Q. That is from six to twelve?

A. Yes, sir.

Q. You came on at 6:15 or so?

A. Yes, sir.

Q. Was your dynamo running when you came on watch?

A. Yes, sir.

Q. And do you recall whether or not the lights were turned on in the hold?

A. Why, my partner told me the lights were burning in all the holds.

Answer objected to and stricken out.

255 Q. What is the method of handling the lights in your engine room there?

A. Why, by dynamo.

Q. Do you have a switchboard?

A. Yes, sir.

Q. Did you at any time that evening after you came on watch, look at your switchboard at all to see what lights were on?

A. When I came on watch I looked to see what switches were in.

Q. Were the switches in the holds on?

A. Yes, sir.

Q. Were the deck light switches on?

A. Yes, sir.

Q. What did you have to do with the operation of the dynamo?

A. Oil it, keep it cool.

Q. What else, if anything, were you doing in the engine room on this evening?

A. Why, I wasn't doing anything.

Q. The dynamo was the only part of the machinery that was in operation at that time?

A. Yes, sir, and to keep water in the boiler.

Q. Did you have occasion to be up on deck at any time before this accident?

A. I was up about eight o'clock, 8:30.

Q. Whereabouts did you go on deck when you were up?

A. Walked around forward of the boiler house.

Q. Did you notice whether or not any hatches were off?

A. I noticed one hatch was off.

Q. What do you say about the lights around the deck and in Number 4 hold at that time?

A. The light was burning in Number 4 hold and there
256 was a light on each end of the hatch, forward side.

Q. How about the lights forward of the boiler house?

A. They was burning.

Q. When did you learn of this accident?

A. The first I learned, I was standing out in the engine room and the wheelsman came down for some buckets and I asked him what he was there for——

Q. At that time did you go up on deck at all to see what was going on?

A. I went down and seen how everything was in the engine room and went up on deck for a few minutes.

Q. Did you walk forward of the boiler house at all?

A. Yes, sir.

Q. At that time did you look down in the hold?

A. Yes, sir.

Q. Were the men still down in the hold?
A. There was one down there yet.
Q. The other had been pulled up?
A. They had him on deck.
Q. Were the lights going then on the deck?
A. Yes, sir.
Q. In the hold?
A. Yes, sir.
Q. How about the other lights?
A. The other lights was there.
Q. Did your dynamo stop at any time from the time that you came on watch until the time after the accident?
A. No, sir.
Q. Now, was the switch in Number 4 hold turned out on the switchboard at any time between the time you came on watch after this accident?
A. No, sir.

257 Cross-examination.

By Mr. Eichelberger:

Q. You were out along the deck that night?
A. I was out forward of the boiler house.
Q. It was pretty dark out on the deck, wasn't it?
A. It didn't seem so to me.
Q. You were accustomed to the decks of vessels, but it was dark except right by the lights, was it not?
A. Why, you could see to walk.
Q. These little lights you speak of on the ends of the hatches were little kerosene lanterns?
A. Yes, sir.
Q. They don't throw very much light, do they?
A. They throw enough light for a man to see, to see whether there is a hole there, to see where he is walking.
Q. Looking for the hole, he could see by the light of one of those lanterns, you think?
A. Why, he could see, yes.
Q. Mr. Franklin, did you eat with the deck hands, the same place the deck hands eat?
A. No, sir.
Q. They have a different place for you to eat?
A. Yes, sir.
Q. Do you recall what time you had supper that night?
A. The first bell rang at 5:45 and we had supper at 6:00.
Q. You think you had supper at 6:00?
A. Yes, sir.

258 Q. You don't know what time the deck hands ate?
A. No, sir.
Q. Were those lights burning in all the compartments that night?
A. Well, they was burning until they put the hatches on and they

came down and we got orders from the chief to put them out in 1, 2 and 3 and leave them burning in Number 4.

Q. It was dark before they put on the hatches that night?

A. I don't know, I was down in the engine room.

—. You just had supper?

A. Yes, sir.

Q. They put the hatches on after supper?

A. I don't know what time they put them on.

The Court: How wide are the hatches?

The Witness: Nine feet.

The Court: How long?

The Witness: Forty feet.

Q. What is the diameter of the hold?

A. 54.

Q. They are longer than 40 feet, aren't they?

A. I don't think so, about 40 feet.

Q. Somewhere either way from 40 feet, you don't know what the accurate measurements are?

A. No.

Q. Did you know the fellow that was called Murphy aboard the boat?

A. Yes, sir.

Q. What was his business aboard the boat?

A. Watchman.

Q. When did he become watchman on that boat?

A. I couldn't tell you.

259 ALBERT MAUSOLF, wheelsman and watchman on the steamer Wilkinson, lying across the slip from the Ohl:

* * * * * * *

Q. Do you remember in September of last year, September 2nd, of lying in the port of Sandusky along side of the Steamer Edwin N. Ohl?

A. Yes, sir.

Q. Do you remember the circumstances of a couple of men falling into the hold of the Ohl that evening of September 2nd?

A. Yes, sir.

Q. Where was your boat lying that evening?

A. Well, we was lying across the slip, loading coal.

Q. You were loading coal?

A. Yes, sir.

Q. What was the nature of your duties while you were loading coal?

A. Why, we was around on deck all the time, whatever there was to do, of course.

Q. Did you know when the accident occurred?

A. Somewheres around nine o'clock.

Q. I mean, was there any confusion or anything to make you know there had been an accident over on the other boat?

A. Yes.

Q. Now, before that time had you noticed anything about the lights on the Ohl?

A. Why, yes.

Q. Did you see any lights on the Ohl and if so, what lights?

A. Why, they had their cabin lights going and I know when we took our coal bunker hatches off, I seen the light on the port side and a light on the starboard side of that hatch; we could see that right along.

260 Q. That light you refer to then was what light?

A. Cabin lights, of course the lights around on the two cabins and the two lanterns.

Q. Where were those two lanterns you speak about?

A. Each end of the hatch, one on each end of the hatch.

Q. From your position on that boat could you see whether any hatches were off on the Ohl?

A. Yes, sure.

Q. Were there any off?

A. There was one hatch off, yes, sir.

Q. Where were those lanterns that you speak of, with reference to the hatch?

A. Where were they placed?

Q. Yes?

A. They were in each end of the hatch.

Q. How did you find out there was any accident over there?

A. Well, we seen that kind of a disturbance on deck, of course, and we was looking over there; we didn't know what it was, just then, until they pulled them out of the hold, if I remember.

Q. How were the lights over there then at the time you knew of this disturbance?

A. Well, the light on the starboard side was on the hatch and the light on the other side, I couldn't just see then, because they was all working around, getting the men out.

Q. The deck lights, were they still burning?

A. Yes, sir, the deck lights was burning.

261 Cross-examination.

By Mr. Eichelberger:

Q. What was the boat you were on?

A. Horace S. Wilkinson.

By Mr. Leckie:

Q. How about the lights on your boat?

A. Well, we had all of our lights going on our boat.

Q. How about the lights on the dock?

A. There was lights on the dock, too, around on the rig.

Q. What sort of lights were there on your boat?

A. Electric lights.

Q. And where were they placed on your boat?

A. Well, they were around on the cabin the same as most of the boats are.

By Mr. Holding:

Q. Where were the lights on the dock?
A. Around on the rig where they load on the bottom.
Q. How near to your boat?
A. Some of them was right over our boat and then there was some up higher on the dock.
Q. What kind of lights were they?
A. Electric lights.
Q. Arc lights?
A. Yes, sir.
Q. How many of them?
A. Well, must have been four or five, something like that.
Q. How near the face of the dock?
A. Why, right along the edge of the dock, maybe five or six feet away from the edge of the dock.

262 Cross-examination.

By Mr. Eichelberger:

Q. You say arc lights, you mean lights like these here (indicating lights in court room)?
A. Well, they are a little different, I guess.
Q. What is an arc light?
A. Well, I couldn't explain that, of course.

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Q. Now, this boat was lying in the same slip that your boat was lying in, was she?
A. Yes, sir.
Q. How wide is that slip?
A. Well, it is probably about eighty feet, probably a hundred, I don't know exactly.
Q. Now, was the boat lying just the same direction, headed the same direction your boat was?
A. Yes, sir, both heading the same direction.
Q. Where was the stern of your boat, with reference to the stem of their boat?
A. Well, I don't just remember that now.
Q. Don't you know your boat was about 400 feet down the slip?
A. No, I don't exactly remember, I don't think it was.
Q. Well, it was approximately 400 feet farther down the slip, than the other boat, wasn't it?
A. No, sir, I don't think so.
Q. How many feet was it?
A. I think they were lying just about right abreast of us, yes, I think they was. They was lying right straight——
Q. You kept moving your boat up and down that slip all the evening?
A. Yes, sir.
263 Q. So one time you would have your stem at the car dump and another time the stern?

A. Sometimes, yes.
Q. Well, whichever position you were in, they were lying abreast of you?
A. Yes, sir.
Q. Now, what did you say your name was?
A. Mausolf.
Q. This was the first season you ever sailed, last season?
A. No, sir, I sailed a season and three months before.
Q. Some years ago?
A. Yes, sir.
Q. What time did you get through unloading your boat?
A. Unloading?
Q. Or loading your boat, rather?
A. Well, let's see, we didn't finish loading that night, we finished the next day some time in the afternoon.
Q. Well, did you lie that night at the dock?
A. Yes, sir, we stayed laying at the dock.
Q. Where, behind the Ohl?
A. No, we shifted ahead.
Q. Shifted ahead of the Ohl?
A. If I remember right.

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Q. All you could see as you claim, was a couple of lanterns on the deck of this boat?
A. Which boat?
Q. The Ohl?
A. Yes.
Q. You saw two lanterns on the deck?
A. Two lanterns and the electric lights, of course, on the cabin.
264 Q. Is that all you know about the hatch being open?
A. Well, I knew it was open, of course, the hatch.
Q. You were watching that boat from your boat?
—. Why, yes, we seen her right along there.
Q. I am not asking you what we did, I am asking you about what you did; were you watching that boat from your boat?
A. We was watching our boat; we couldn't help seeing them.
Q. Who is "we," who are you talking about?
A. A partner of mine.
Q. What were you doing aboard the Wilkinson?
A. Wheeling and watching.

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ROBERT GREKOWICZ, who was also wheelsman and watchman on the Wilkinson, testified that he and Albert Mausolf were on watch and that he remembers the accident; that his duties took him around the deck of the Wilkinson:

* * * * * * *

Q. Do you remember an accident on a boat lying in Sandusky on the second of September of last year?

A. I do.
Q. What was your boat doing?
A. We were loading coal at Sandusky.
Q. Did you see any other boats around there?
A. Yes, sir.
Q. What other boat did you see around there?
A. The Edwin N. Ohl.
265 Q. Where did she lay with reference to your boat?
A. She lay in the same slip, just along side of us.
Q. What watch were you on?
A. I was on the forward watch.
Q. That is from when until when.
A. From six until twelve.
Q. Now, what duties were you yourself performing as your boat was lying there loading coal?
A. We were assisting in helping load the boat.
Q. Where did your duties take you, whereabouts on your boat were you?
A. We were on deck most of the time, in fact, all the time.
Q. Sometime during the evening did you learn whether there had been an accident over on the Ohl?
A. We did.
Q. Now, previous to that time, what lights, if any, did you see on the Ohl?
A. Well, she had all her deck lights burning, that is on the forward and after house and lanterns on the hatch.
Q. Could you tell on what hatch or near which end?
A. I couldn't just tell exactly what hatch they were on; it looked to us about the third, second or third hatch from the boiler house.
Q. Now, where were those lights that you saw on the hatch?
A. There was one on each side.
Q. What sort of lights were they?
A. They were just lanterns.
Q. Were they lighted and burning?
A. They were.
266 Q. What lights were burning on your ship?
A. Why, we had all the lights going with the exception of the range lights.
Q. And the range lights are the ones away up on the mast?
A. Yes, sir.
Q. Were there any other lights around on the dock there?
A. There was, big arc lights on the dock.
Q. About how many of them?
A. I couldn't just exactly tell, four or six of them.
Q. Four or six of them?
A. Yes, sir.
Q. And were they all burning?
A. They were.

* * * * * * *

Cross-examination:

Q. Now, what time did you get through loading there that night?
A. Oh, I don't just remember, it was somewhere around midnight.
Q. That is, you moved your boat somewhere after midnight?
A. Somewheres around, yes, sir, it was after midnight.
Q. How long after midnight was it?
A. I couldn't just exactly say what time it was; it wasn't very long.
Q. Where did you move it to?
A. Just moved across the slip.
Q. Moved across to the other side of the slip?
A. Moved across to the other side of the slip.
Q. Then the Ohl moved back to the side of the slip you had been at?
A. Yes, sir.
267 Q. As you lay in the slip, how far ahead of you was the Ohl?
A. She was directly across from our boat.
Q. She was directly across at all times?
A. Well, very nearly.
Q. You were moving your boat up and down the slip that night weren't you?
A. We did some, yes.

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Q. Did you notice whether any other hatch was open on the deck of the Ohl?
A. No, sir.
Q. Did you notice any hatch being open?
A. Well, we knew there was a hatch open.
Q. I asked you if you noticed; of course, you knew when you found the men had fallen into it; did you know before that that any hatch was open?
A. We did.
Q. Now, do you know what number hatch that was?
A. No, sir, I do not.
Q. Well, was there more than one hatch open?
A. No, sir.
Q. Just one hatch?
A. Yes, sir.
Q. And that hatch stayed open all that night, did it?
A. Yes, sir, I guess it did.
Q. Well, after this accident you looked across and saw that hatch was open until you went off watch?
A. You mean after the accident?
Q. Yes?
A. I couldn't say whether after the accident the hatch was open or not.
Q. You only noticed the hatch before the accident?

A. Yes, sir.

268 Q. And after the accident, after you found the men had fallen and had been horribly injured on that boat, you paid no more attention to that hatch?

A. No, I don't remember.

Q. Now, why did you pay any attention to the Ohl when there wasn't anything over there to call your attention to it before the accident?

A. Why, just going up and down the deck, we saw the lights.

Q. Well, were you looking to see if the hatch was open then?

A. Why, no, we wasn't looking to see if the hatch was open.

Q. You just couldn't help seeing it, by looking across there?

A. No, we didn't by just looking across. We could see the lights.

Q. You looked across to see if any hatch was open?

A. Not exactly, no.

Q. Now, after this accident happened and those boys were lifted out of the hold and carried off to the hospital, did you look over at the Ohl again that night?

A. I don't remember whether I did or not.

The Court: Could you tell how high the hatches were on the Ohl?

The Witness: I couldn't just exactly tell, no, about 16 or 18 inches.

Q. Do you know when they put the lanterns out there and lit them?

A. No, I do not, I can't tell just what time.

269 C. H. HEATON said he was a ship captain and had been following the lakes for about 25 years and had been master of the most modern boats.

* * * * * * *

Q. Is there a custom on the Great Lakes, Captain, with regard to the handling of hatches?

A. Yes, sir.

Q. Heaving them on or off in port?

A. Yes, sir.

Q. Take it at a coal loading port, what is the custom on the Great Lakes with refernce to having your hatches on or off?

The Court: You mean in port or outside?

Q. In a coal loading port?

A. Always have them off before we go to the dock so that when we are at the dock we have some off.

Q. Did you load at Sandusky at all last summer?

A. Yes, sir.

Q. Can you tell whether or not that custom prevailed at Sandusky?

A. Always prevailed with my ship.

Q. Is that so day or night?

A. Yes, sir.

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Cross-examination.

By Mr. Eichelberger:

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Q. Is this Sandusky a fast loading plant, that short line dock?

A. We call it a fast plant, the fuel is a little better but not many, only a couple better than the Sandusky plant.

270 Q. You are rather slow getting a cargo as a rule at Sandusky?

A. No, sir.

Q. Generally go in and go right out?

A. Providing there is no boats ahead of you.

Q. You say there is a custom about putting on or taking off hatches when you go to the dock; are you talking about what you do personally or what other ships do or what they all do?

A. I only sail my own boat, I couldn't talk for other boats. The boats I have been on, we always have the hatches off.

Q. Is that one boat you are talking about; now, other masters keep their hatch covers on until they are ready to put cargo in, is that true?

A. No, sir.

Q. How long before they start to put cargo in do they open their hatches?

A. Well, that depends on circumstances. If I was going into Sandusky I would have the hatches off or one off when I got to the dock, ready to go under the machine.

Q. If you are laying up at another dock and there was another boat under the coal dump, you don't know whether you would or not take off your hatch?

A. I would take it off before I went to the dock.

Q. Just before you went to the dock you say you think you would?

A. Yes, sir, just before; when we find out we are going over there we would give orders to take the hatches off.

Q. Just before you went across to the dock you would open that hatch?

A. Well, that would depend on circumstances. We might be ordered across and then not go across.

271 Q. You don't, as a rule, open one hatch and leave the rest closed when your vessel is tied to a dock at night and not engaged in taking on cargo and not on her way to any other dock, do you?

A. We always take one hatch off before we move to the other dock.

Q. Before you move?

A. Yes, sir.

Q. You got my question, did you, the last time?

A. I think I did.

Q. I asked you when you were laying at a dock and not engaged in taking on cargo and not moving your vessel, do you open one hatch on your boat and leave the rest closed, at night?

A. I do, yes, sir.

Q. You do?

A. Owing to circumstances.

Q. Now, would you call that careful management of your vessel, Captain?

A. Yes, sir.

Q. Would you consider that was paying proper regard for the safety of inexperienced seamen, to do that?

A. We do not try to have that kind of seaman aboard the boat.

Q. But if you had some green, inexperienced boys on the boat, would you?

A. If I was to shift over to the dock, when I got orders, she would have one hatch off and have that hatch guarded.

Q. Suppose you weren't going to move to the dock until after midnight, would you think it good seamanship and proper regard for the safety of people aboard your boat, to open a hatch at 6:00 or 6:30 at night while you were lying at a dock and all your men ashore or most of them?

A. Well, that all depends on circumstances.

272 Q. I am telling you some of the circumstances; now, suppose you were lying at a dock, take the case right in point, suppose you were lying over at Sandusky, had been lying there for several days, a vessel over under the coal dock, your crew ashore or mostly all ashore, and you didn't move your boat over until about midnight and didn't begin taking on cargo until four o'clock in the morning, would you regard it careful conduct of the vessel and proper regard for the safety of the people aboard her, to open one of the hatches and close the rest of them at 6:00 or 6:30 in the evening?

Objected to. Sustained.

Q. Do you wish to tell the jury that there is a general custom on the part of the masters on these Great Lakes to open one of the hatches on the deck of the vessel at night, at six o'clock, and leave the rest closed or close the rest, when they do not expect to move to the dock until midnight?

Mr. Holding: I object, because there is no evidence in this case that they did not expect to move to the dock until midnight.

The Court: That will be a question for the jury. You may answer.

To which ruling of the court the defendant then and there duly excepted.

A. Well, that is a pretty hard thing to answer. I always have a hatch open before I move across to the dock and we never expect to move until we get orders to move, whatever time that might be.

273 Q. I am not asking you to argue this case, Captain.

A. I am not arguing.

Q. I will ask you whether there is any custom that requires you to open your hatch six hours before moving over to the dock where you expect to get your cargo?

A. If I did not intend to move over, I don't think I would take any off until I got orders, but if I got orders to move over, I would take them off. There wouldn't be any set time. I don't think that is a fair question to ask.

Q. Is there any custom of that character, is there a custom regulating that, first?

A. Well, there is no custom regulating the time you go over, you get orders to go whenever it may be.

Q. There is no custom regulating the time you open your hatch, with regard to the time that you move over, except when you are moving over you open your hatch?

A. No, we do not open the hatches when we are moving over.

Q. Leave it until just before you move over?

A. When we get orders to move over we open the hatch.

Q. Just before you move the boat?

A. That all depends when we get orders.

Q. If you get orders to move tomorrow you wouldn't open your hatch tonight?

A. No, sir.

Q. You would open your hatch just before you moved over, wouldn't you?

A. I would lift my hatch off as quick as I got orders and was going to move over. I wouldn't put them on again if the order had been cancelled.

274 Q. You mean if you are lying at the dock today and you get orders to move over to the other dock tomorrow morning, that you would open the hatch?

A. No, sir, I don't, anything of the kind.

Q. Now then, the next thing I want you to tell me is this: If you knew you had inexperienced boys aboard the boat, shipped as deck hands, you would take a little extra precaution, wouldn't you, to guard them and warn them of that danger?

Objected to.

A. We always do that.

To which answer the defendant objected and moved the Court to strike out the same, which motion was overruled by the Court, to which ruling of the Court the defendant then and there duly excepted.

Q. How long does it take to open one of these collapsible steel hatches?

A. One hatch?

Q. Yes?

A. That all depends on whether it is the first, second or last one. The first hatch takes longer.

Q. How long would it take to open 23 hatches?

A. In the neighborhood of 35 minutes, 40 minutes.

Q. Taking something less than two minutes to a hatch?

A. Yes, after the first hatch if off; it takes longer to move the first hatch than any of the rest. If I was to go aboard the boat and tell

the men to get off the hatches, it would be 15 minutes before they would be ready to move the boat.

275 SAMUEL NEWMAN, being recalled for further cross-examination, testified as follows:

By Mr. Eichelberger:

Q. Mr. Newman, when you were on the stand this morning you said you were a watchman; when did you become a watchman?
A. Well, I guess it was Labor Day.
Q. That is, the day before the accident?
A. Yes, sir.
Q. You had never been a watchman before in your life, had you?
A. No, sir.
Q. You never sailed before that season?
A. No, sir.
Q. You had been a deck hand up to Labor Day?
A. Yes.
Q. And the day before they told you to be a watchman, the day before this accident they told you to act as watchman, did they?
A. Yes.
Q. What became of the watchman that you succeeded?
A. He quit.
Q. Quit the day before?
A. Yes, sir.
Q. They took you from among the deck hands to take his place?
A. Yes, sir.
Q. Did you have any examination or training for that position at all?
A. No, sir.
Q. How old are you now?
A. 19.
Q. And so you were 18 years old last September?
A. Yes, sir.
Q. And you were the man that was entrusted with the watching of the ship that night that these boys were hurt?
A. Yes, sir.
276 Q. And nobody else on the deck but yourself?
A. But myself.
Q. That is one thing; the other thing I want to ask you about is this: When those boys were hurt, how were they dressed, did they have on their good clothes?
A. Yes, sir.
Q. When they were working before supper, how were they dressed, have on their old working clothes?
A. Yes, sir, had on old working clothes.
Q. You went up town at different times while you lay at Sandusky Harbor there; do you know how far the mail box was away from the boat?
A. I guess it was away up town, I think.

Q. I believe from what you said, those boys were gone from the boat altogether about one hour that night?
A. Yes, sir.
Q. You saw them when they started up town, did you?
A. Yes, sir.
Q. They hadn't had anything to drink when they started up town?
A. No, they didn't have nothing.

Whereupon the defendant rested.

277 *Rebuttal.*

JOSEPH MRAZ.

Whereupon to rebut the evidence offered by the defendant, the plaintiff called as witness, JOSEPH MRAZ, who testified through an interpreter as follows:

Direct examination.

By Mr. Nord:

Q. Now, Joe, when you came on the boat that night, did Mr. Newman over here, the fellow that they called Murphy on the boat, say to you in the Polish language that the hatch was open?
A. No, no, sir.
Q. And did you say to him at any time that you knew that the hatch was open?
A. No, sir, I did not tell him, when I didn't know it.
Q. When you came on that boat were you drunk?
A. No, sir.
Q. Did you talk to Murphy in the Polish language?
A. No, sir, I don't understand the gentleman.
The Court: Do you understand the Polish language?
The Witness: No, I never was in Poland, I can't understand it.
Q. Did you see Murphy on the boat that night at all after you came on the boat?
A. I didn't see him.

278 Q. Now, Joe, any time that night after you came on the boat, did Newman yell out to you in any way that the hatch was open or warn you that it was open?

A. No, sir.
Q. Did you that evening, after you came on the boat, chase John around the deck or did he chase you around the deck?
A. No, we didn't do any running. After we came back from the post office we sat down by the hatch.
Q. Do you know how far it was from the boat up to his place that you call the post office or where you mailed your letters?
A. Yes, sir.
Q. How far was it?
A. About four blocks.

No cross-examination.

JOHN WATTAWA.

Q. John, after you came on the boat, after you had been down to mail letters or your cards, did Newman at any time say to you that the hatch was open and that you should look out for it?

A. No, sir.

Q. Did you say to him at any time that evening that you knew the hatch was open?

A. No, sir.

Q. Did he at any time warn or yell out to you about the hatch being open?

A. No, sir.

Q. Did you see him there on the deck that evening at all after you came back?

A. After I came back I didn't see him.

Q. Now, John, when you came back on the boat were you affected in any way from drinking, were you drunk?

A. No, sir, I was not drunk.

279 Q. Did you chase Joe around the deck?

A. No, sir.

Q. Did he chase you around the deck at any time that evening?

A. No, sir.

Q. Were you running on the deck that evening at any time?

A. No, sir.

The Court: Which of you boys had the whiskey bottle?

The Witness: He had the whiskey bottle in his pocket.

Q. Now, did you offer Newman a drink out of this whiskey bottle?

A. No, sir.

Q. Did Joe offer him a drink while you were around?

A. To whom?

Q. To Newman, to Murphy?

A. No, sir.

Q. Did you have the whisky bottle out at all upon that deck that evening?

A. No, sir.

Q. Did you have a drink on the boat that night after you came back from up town, out of the whiskey bottle?

A. No, sir.

The Court: Did you have your shoes off, John?

The Witness: No, sir.

The Court: Did Joe have his shoes off?

The Witness: No, sir.

Cross-examination.

By Mr. Holding:

Q. Well, John, what did the doctor there at the hospital say to you about finding broken glass in your pocket?

A. In my coat?

Q. Yes, what did he say?

A. He didn't say nothing, he didn't find any whiskey in my coat.

280 Q. But the broken glass I am talking about, what about that?

A. He didn't find it in my coat.

Q. Did you see the mate up in your town last summer?

A. Why, yes, I seen him.

Q. You had a talk with him, didn't you?

A. Yes, sir.

Q. What did you say to him about that bottle that was broken in your pocket?

A. To the mate?

Q. To the mate?

A. What did I say to him about the bottle, nothing.

Q. What did you say to him the doctor said to you about the bottle being broken in your pocket?

A. The doctor said he found a bottle broken in the pocket.

Q. That is what you told the mate?

A. But not in my pocket.

Q. The doctor said he found a bottle broken in whose pocket?

A. That is what the doctor told me in the hospital.

Q. In whose pocket?

A. In Joe's pocket.

Whereupon the plaintiff rested.

Whereupon the defendant rested.

The above and foregoing was all of the evidence offered or given by either party on the trial of the above cause.

281 All requests refused except as given in general charge.

Defendant's Request No. 1.

If you find that the plaintiff in this case knew, or in the exercise of ordinary care could have known that the cover of the hatch into which he fell was off, in time to avoid falling into the hatch, then he was guilty of negligence and cannot recover in this action.

Defendant's Request No. 2.

When plaintiff shipped upon defendant's vessel, he assumed the risk of injury from obvious dangers or those dangers which he might avoid by the exercise of ordinary care.

Defendant's Request No. 3.

The officers of this vessel had the right to assume that plaintiff would take ordinary care of himself in moving about said vessel and had the right to leave No. 22 hatch open and without covers thereon if they left sufficient lights in or about the vicinity of the hatch to

enable plaintiff, in the exercise of ordinary care, to see that the hatch was open and thus avoid stepping into it.

Defendant's Request No. 4.

It was not part of the duty of the officers on the vessel of defendant to give personal warning to plaintiff that the hatch was open. It was their duty when the hatch was uncovered to leave or place sufficient lights in or about the vicinity of the hatch to enable persons who passed along the deck to see, in the exercise of ordinary
282 care, that the hatch was open, in time to avoid falling into the hatch, and if you find that this hatch No. 22 was sufficiently lighted to enable plaintiff to see the hatch was open, and in the exercise of ordinary care, to avoid falling into the same, then plaintiff cannot recover in this action.

All requests refused except as given in general charge.

Whereupon the court charged the jury as follows:

FORAN, *J.*:

Gentlemen of the jury, John J. Wattawa, the plaintiff, says that the defendant, The Valley Steamship Company, is an Ohio corporation, having its principal place of business in this city and county; that it is engaged in carrying bulk freight upon the Great Lakes and tributary waters and that to that end, it owned and operated the Steamer "Edwin N. Ohl," a large vessel of 7,500 tons capacity, having 23 hatches 9 by 40 feet, situated close together and extending almost across the width of the vessel and which were covered with collapsible steel covers opened and closed by machinery; that in operating said vessel, the defendant regularly employed more than five workmen and that it had not availed itself of the provisions of an Act of the General Assembly of the State of Ohio, creating a State Insurance Fund for the benefit of injured employes; that on September 2, 1913, and for a few days prior thereto, the plaintiff was in the employ of the defendant on said Steamer "Ohl" as
283 a deck hand; that he had but a few days' experience in and about steamers, all of which the defendant well knew; that on or about September 2, 1913, said Steamer "Ohl" was moored or tied to the dock in the harbor of Sandusky, Ohio, waiting to take on a cargo of coal; that about ten P. M. on the day he was walking on the deck of said vessel, over these hatches to the quarters provided for deck hands, when suddenly, without fault on his part, he stepped into an open hatch which he says was negligently left uncovered by the defendant and that he fell to the bottom of the vessel, a distance of about 30 feet, sustaining severe and serious injuries which are permanent in their nature and character.

He further says that he did not know the hatch was uncovered at the time and that he received no warning from the defendant or its agents and officers having charge of the vessel, that the hatch was uncovered or unguarded and that the injuries he thus sustained were directly and proximately caused by the negligence of the defendant,

to his damage in the sum of $20,000.00, for which amount he asks judgment against the defendant.

To this petition the defendant has filed an amended answer in which it admits it is an Ohio corporation; that it was and is the owner of the Steamer "Edwin N. Ohl"; that when this steamer was being operated it employed more than five men, but that the steamer was not operated to exceed seven months in the year and was
284 not required by the statutes of Ohio to become a subscriber or contributor to the State Insurance Fund of Ohio.

It admits that the plaintiff was in the employ of said steamer while it was moored in Sandusky Harbor, waiting to take on a cargo of coal. Further, the defendant says that the hatch into which the plaintiff fell was removed for the purpose of having the vessel in readiness to take on said cargo; that this was done in pursuance of and in conformity to a uniform and universal custom which was known to and acquiesced in by those engaged in navigating and operating vessels upon the Great Lakes and tributary waters; that the plaintiff assisted in removing the hatch cover and knew that it was off; that there were lights in the hold of the vessel on each end of the hatch, upon the deck and the dock, and that these lights were sufficient for him to see that the hatch was open or uncovered and that he was guilty of negligence directly and proximately causing any injuries he sustained, in attempting to cross the uncovered hatch.

The defendant admits the plaintiff fell into the hatch and that he was injured, but not in the manner or to the extent claimed in the petition, and says any injuries that the plaintiff received were due wholly and solely to his own negligence and denies all other averments or allegations in the petition that are not admitted in the answer.

Wherefore it prays that the petition be dismissed and it may go hence with its costs.

285 To this answer the plaintiff has filed a reply in which the plaintiff says that he denies all, each and singular the allegations and averments in said answer contained which are not admissions of and not consistent with the allegations and averments contained in his petition.

These pleadings make up the issues, gentlemen, in this case.

You will have them with you in your jury room and may examine them at length and in detail, for the purpose of ascertaining the respective claims of the plaintiff and the defendant. You are cautioned that they are not evidence and are not so to be regarded. Nor is any statement or allegation in the petition or the answer to be taken as evidence.

These pleadings contain merely a statement of what the parties claim, the plaintiff, by way of his petition, and the defendant, by way of answer. The same is true with respect to the opening statements of counsel made at the beginning of the case. Those statements are not evidence except in so far as they may contain admissions; they are merely statements of what counsel expect their testimony would tend to show.

You will notice that the amended answer of the defendant avers

that the Steamer "Edwin N. Ohl" was not operated at any time to exceed seven months in the year and that it was not required by the statutes of Ohio to become a contributor or subscriber to the State Insurance Fund of Ohio.

286 I say to you as a matter of law that the defendant was not exonerated or relieved from the operation of the statutes of Ohio creating a State Insurance Fund for the benefit of injured employes, by the fact that it only operated this steamer for seven months in a year. Being an Ohio corporation, doing business in Ohio and having its general office and place of business in Ohio, it was and is subject to all the provisions of this act or these statutes.

This action, gentlemen, sounds in tort or is predicated upon negligence. In principle, however, it does not differ from any other action at law. In every action at law, the plaintiff bases his right to recover from the defendant because the defendant has failed to perform some legal duty which the plaintiff avers the defendant owes to him. If a man brings a suit upon a debt or upon a contract, he bases his right to recover for the reason that the party sued has failed in the performance of some legal duty.

In this case the plaintiff claims that by reason of said injuries he avers he sustained, he has suffered a pecuniary loss and that the defendant is liable to him for this loss, for the reason that the defendant owed to him the legal duty to keep the deck of the Steamer "Edwin N. Ohl" in a reasonably safe condition while he was passing over it, going to his quarters and that the defendant failed in the performance of this duty and in thus failing to perform this duty, it was guilty of negligence for which he has a right to recover.

287 This case, gentlemen, is based upon negligence. Negligence, as that term will be used in these instructions, means a failure to use ordinary care. You are instructed that ordinary care depends upon the circumstances of each particular case and is such care as a person of ordinary prudence would usually exercise under the same or similar circumstances, having regard to the work to be accomplished and the rights of those who are performing that work.

The mere fact that plaintiff was injured as he claims in his petition, raises no presumption of the defendant's negligence, for negligence is never presumed; it must be proven.

As I have said, negligence is a failure to do what a prudent person would ordinarily have done under the circumstances of the situation or doing what an ordinarily prudent person under such circumstances would not have done. This rule applies alike to the conduct of the plaintiff and the conduct of the defendant at the time the alleged injuries are claimed to have been sustained.

There is no precise definition of ordinary care, but it has been said it is such care as an ordinarily prudent person would exercise under like or similar circumstances and should be proportioned to the danger and peril reasonably to be apprehended from a lack of proper prudence.

What would be ordinary care under certain circumstances would

not be ordinary care under others and still it is only ordinary care under the circumstances.

288 The burden of proving negligence rests with the plaintiff alleging it. The plaintiff who charges negligence on the part of another as a cause of action or as a basis for the action, must prove the negligence by a preponderance of the evidence. It is not incumbent upon the defendant to establish that it was not guilty of the negligence charged in the petition. The burden is not upon the defendant to show that it was not negligent in any respect, nor is the burden upon the defendant to show or prove that the plaintiff was negligent at the time he was injured. But the burden is upon the plaintiff to prove the negligence of the defendant and the exercise of ordinary care upon his part.

I say to you further that if you find that the evidence of the plaintiff raises a presumption that at the time of the alleged injuries he was not in the exercise of ordinary care and that the injuries of which he complains were due solely and wholly to his own negligence, it is then incumbent upon him to remove that presumption by his evidence.

The burden is upon the plaintiff to prove by a preponderance of the evidence the fact that he was injured; second, that he was at the time of the injury in the exercise of reasonable and ordinary care and caution for his own safety; third, that the injuries of which he complains were the direct and proximate result of the negligence of the defendant at the time and place the same as set out and charged in the petition.

289 You are further instructed, gentlemen, that the questions involved in this case, as alleged in the plaintiff's petition of negligence on the part of the defendant, if any, and the exercise of reasonable care upon the part of the plaintiff, are what are known as questions of fact which it is the duty and province of the jury to determine in the light of the evidence in the case and the instructions which the Court shall give you or has given you. Whether there was or was not a want of due care upon the part of the defendant or plaintiff or both, it to be determined from a fair and impartial consideration of all the facts, the situation and surroundings at the time of the accident and tested by your judgment as practical men and guided by the instructions which the Court has or will give you.

You are further instructed that you must find from the evidence before the plaintiff can recover, that the negligence complained of was the proximate cause of the injury.

The proximate cause of an injury of the kind mentioned in the petition is that cause without which the injury would not have occurred. It does not necessarily mean the cause nearest in point of time or distance, but as I have said, it is that cause without the existence of which the injury would not have been sustained.

You gentlemen are the sole judges of the facts in this case and of the credibility of the witnesses and of the weight to be given

290 their testimony. It is your duty to determine the weight and effect of the evidence as a whole and as necessary to such

determination, it is your duty to recall, as far as you can, and weigh the testimony of each witness.

I say this to you because some time has elapsed since the case was begun and there has been considerable evidence taken in the case.

And to judge his testimony or its credibility as best you can in the light of all the facts as disclosed by the evidence. It is your right to determine from the appearance of the witnesses on the stand their manner of testifying, their apparent candor and frankness, or their lack of candor or frankness, which witnesses are more worthy of credit and judge their testimony and the weight you shall give it accordingly. And to this end you have a right and are authorized to consider and take into account the relation which the witnes-es bear to the parties, if the same is proven, their interest, if any, in the result of the litigation, their temper, if any is manifested, their feeling or bias, if any is shown, their demeanor on the stand, their means of information, the reasonableness or probability of the evidence given by them and give weight accordingly.

The credibility of a witness depends largely upon two things; first, his knowledge of the facts, that is, his ability to know what occurred, and second, his disposition to tell and relate correctly and truthfully what did occur. The statements of a witness having superior or better opportunities of knowing what took place or what
291 was said and superior memory and intelligence and who is entirely disinterested in the result of the suit, other things being equal, are entitled to greater weight than the statements of a witness whose opportunities of knowing what occurred were limited, and whose memory and intelligence are only mediocre, and who by reason of his relation to one of the parties may not, in your opinion, be entirely unbiased and wholly disinterested in the result of the litigation.

If you believe from the evidence that any witness has willfully testified falsely as to any material fact in the case and is not corroborated as to such fact by other credible evidence in the case, you are at liberty to disregard the whole or any part of the testimony of such witness. It should, however, clearly appear that the witness has knowingly and willfully testified falsely as to some material fact before you would be justified in rejecting his entire testimony, for a witness might be mistaken as to some of his statements and be wholly truthful as to other statements.

Another matter I desire to call your attention to is this:

If a witness is an employe of either party and the jury should believe from the fact and circumstances under which the witness is called, his relation to his employer and his manner of testifying, that he testified under fear of losing his employment or from
292 a desire to avoid censure or from a fear of offending or from a desire to please his employer, such fact may be taken into consideration in determining the degree or weight that is to be given to the testimony of such a witness.

But you are instructed that witnesses are not and should not be under suspicion, nor should their testimony be discredited simply and solely because they are employes.

You are the sole judges of the credibility of witnesses. You have no right to disregard the testimony of an unimpeached witness sworn on behalf of one party, whether the plaintiff or defendant, simply and solely because such witness was or is in the employ of the party calling him. You are to receive and weigh the testimony of such witnesses in the light of all the evidence, the same as you would receive and weigh the testimony of any other witness, and determine the credibility of such witness by the same principles and tests by which you would determine the credibility of any other witness.

You have a right to take into account his relation to the party calling him, his candor or his want of candor, his manner of testifying, his interest in the case, if any, and his opportunity of knowing the facts about which he testifies.

In this, as in all cases, the law is that a party coming into a court of justice must convince the jury by what is called a preponderance of the evidence as to the justice of his claim.

293 That is a general rule; the burden is upon the plaintiff to prove his case by a preponderance of the evidence. The burden sometimes shifts to the defendant as to some issue or as to the whole case, but where it does or in instances where it does, the Court will call your attention to that fact.

In this case the burden is upon the plaintiff as to all the issues in the case.

By a preponderance of the evidence is meant the greater weight of the evidence. Evidence is that which convinces a man of the truth. If a witness swears to something which, in view of all the facts and circumstances in the case, you believe to be untrue, that may be testimony, but it is not evidence.

Preponderance of the evidence is that evidence which is more convincing to the mind; it does not mean that the party on whom the burden rests must necessarily produce the greater number of witnesses, but it does mean that the testimony of the witnesses he does produce must carry and have greater weight with you, have more convincing force than the other. It does not necessarily depend upon the number of witnesses on one side or the other and yet it is your duty to take into consideration the number of witnesses who testify on either side, bearing in mind that it is an axiom of law that witnesses are not counted, but that testimony is weighed. A sure test as to where the weight of testimony in this or any case lies is this:

294 After a full, fair and candid consideration of all the testimony in the case, the preponderance or greater weight is where you believe the truth to be. If you bear this fact in mind, you will have no difficulty in determining where the preponderance lies.

Certain testimony was given by some witnesses as to statements made by other witnesses. For instance, the witness, Officer Perry, was asked if he did not say to Mr. Leckie that there were plenty of lights there, meaning on the vessel or dock, "When I was there." The witness Perry denied he made this statement. Then Mr. Leckie

testified that Officer Perry did make this statement to him the morning or day after the accident.

You are cautioned that this testimony is not to be considered by you as tending to prove the statement it is claimed Officer Perry made is in fact true. In considering testimony of this kind, that is contradictory in its nature and character, you are to consider it only in determining the credit to be given to the witness whose testimony is thus contradicted. That is, if you believe a witness made a statement out of court at some other time and place, which is contradictory of the testimony of the witness given upon the witness stand before you, you may consider that fact, if you believe it to be a fact, in determining the weight you should give his testimony in court and in determining his credibility as a witness. It was for this purpose only that this testimony was admitted.

295 The plaintiff claims there existed at the time he was injured a custom or usage on the Great Lakes and waters tributary thereto, that hatches on vessels should not be uncovered until just immediately prior to taking on cargo.

The defendant, however, claims the custom or usage was to uncover the hatches or one of them at least as soon as word was received from the dock or shipping agent that the loading plant or machinery was ready for the vessel and this was customarily done before the vessel reached the dock or place where the cargo was taken on. So you see there is a conflict as to what this custom was. It is for you to say, gentlemen, from the evidence, what the custom was or whether there was a custom at all or not, under the instructions that the Court will give you.

I say to you as a matter of law, that when employment contracts are entered into, the parties are presumed to know and are governed by the known usages and customs relating to the business. These customs or usages, in order to be binding upon the parties, must be generally known and established among those engaged in the business and so well settled and uniformly acted upon as to raise a fair presumption that it was known to both parties and that they made or entered into the agreement of employment having the custom in contemplation as part of the contract of service. The custom or usage should be general, uniform, certain and reasonable and of sufficient standing as to time to afford a presumption that it

296 was generally known. If it does not meet these requirements it does not amount to a custom or usage.

If there was a custom in relation to this matter and it was, as claimed by the defendant, then the plaintiff, if he knew of the custom, was bound to anticipate that the hatches might be uncovered at any time after the vessel reached the port where she was to take on cargo. If the custom, however, was as the plaintiff claims, then he was not bound to anticipate that the hatches would be uncovered until just before the loading machine was reached. If he knew, as a matter of fact, that this hatch was uncovered or if he aided or assisted in uncovering it for the purpose of making ready to take on cargo, he was bound to take such precautions as an uncovered hatchway required and demanded, and you are instructed that mere for-

getfulness, absence of mind or inadvertence will not excuse a man from the exercise of due and ordinary care for his own safety. But in this connection and as bearing upon the plaintiff's knowledge of the uncovered hatch-way, you may take into consideration the natural instinct which leads men of ordinary intelligence in their sober senses to avoid injury and preserve life and limb. Would the plaintiff, if he knew the hatch was uncovered, deliberately walk into it or if he knew, had he forgotten it? These are questions for you to determine from all the evidence, all the facts and surrounding circumstances existing at and just prior to the time the plaintiff fell into or walked into the open hatch-way.

297 It was the duty of the defendant to keep the decks and other portions of this vessel used by the deck hands, in the performance of their duty or in going to their quarters, in a reasonably safe condition. The extent of the defendant's duty in this respect, however, was to exercise reasonable and ordinary care, having due regard to the hazards of the service. The defendant was not an insurer of the safety of the decks and other portions of the vessel necessarily used by the deck hands in the performance of their duties or in going to or coming from their quarters, and the limit of its duty and obligation in this behalf was to exercise reasonable and ordinary care to see that the employes were provided with a reasonably safe place in which to perform their duties or to do such other acts as were necessarily incident to and connected with the service in which they were engaged.

The plaintiff claims it is customary on board ship to walk on the deck and over the hatches when covered.

It is for you to say what the evidence discloses as to this claim. If the open hatch was so lighted that the danger could be readily seen by an ordinarily prudent man as he came to it, of course the plaintiff cannot recover. He was not bound, however, as he passed over the deck, to anticipate the hatch was open unless the light was such as disclosed the danger (or unless he knew it was open), for he had a right to presume the defendant was in the performance

298 of his duty to keep the place reasonably safe. If he knew of the danger, however, or if the circumstances and lights were such that he ought to have known it, he cannot recover in this case.

You are instructed where a servant or employe while working for another, where the servant is in danger, be that other a private individual or a corporation, that is where the man receives an injury, personal injury, by reason of any defect or unsafe condition in the ways, works, decks, place or appliance connected with or in any way used in the business of the employes, such employer shall be deemed to have had knowledge of such unsafe condition before and at the time such injury was sustained.

And if you find from the evidence in this case that there was an unsafe condition in the deck of this vessel and that by reason thereof the plaintiff was injured as claimed by him in his petition, he at the time being in the exercise of due care for his own safety, then I say to you that such unsafe condition, if so found by you, is prima facie

evidence of the negligence of the defendant. And unless you should also find from the evidence that the unsafe condition in the deck was not discoverable by the defendant by the exercise of ordinary care, the plaintiff would be entitled to recover in this action. That is, while such unsafe condition in the deck would be prima facie evidence of negligence on the part of the defendant, yet the defendant had a right to show by way of defense that the unsafe condi-
299 tion was not discoverable by the exercise of ordinary care. That is, taking into account the fact, if it be a fact, that there were men on shore and coming in and liable to come in at all times, who were not on board at the time the hatch was uncovered.

It is claimed by the defendant that the testimony of the plaintiff disclosed the fact that he knew of the unsafe condition on the deck and that therefore, he was guilty of negligence which solely, directly and wholly caused the injuries of which he complains.

Upon this phase of the case, I say to you that before you can find against the plaintiff upon this claim of the defendant, you must find the defendant was wholly free from negligence and that it was not guilty of any wrongful act, neglect or default, and that the injuries of which the plaintiff complains were caused solely and wholly by the negligence of the plaintiff.

If both were negligent, both the defendant and the plaintiff, and the plaintiff's negligence merely contributed to the injury, then the plaintiff can recover.

If you find the plaintiff had no experience on board this steamer or vessel or on board steamers or vessels of any kind and knew nothing of the dangers usual and ordinarily incident to this kind of service and the defendant knew and through its officers having charge of the vessel, know this fact, it was the duty of these officers to give the plaintiff such instructions as would necessarily en-
300 able him, by the exercise of ordinary care, to know and understand the hazards ordinarily and usually incident to the performance of his duty or as were usually and ordinarily incident to walking on the decks of the vessel for any necessary purpose, as going to his quarters. But in this respect you would have a right to take into consideration the number of trips the plaintiff previously made and what experience he had and what vessels he had sailed on.

If you should find from the evidence that the injuries sustained by the plaintiff were the result of a mere accident and neither the plaintiff nor the defendant were the cause thereof, your verdict will be for the defendant. An accident is something that results from the operation of chance, a happening without intentional causation, that is, an event happening without the concurrence of the will of the person by whose agency it was caused. Every person must be held liable or is liable for all those consequences which flow naturally and directly from his act or which might have been foreseen and reasonably expected as the result of his conduct, but not for those consequences which do not flow naturally and directly from his act or which he could not have foreseen or reasonably have anticipated as the result of his conduct.

You have noticed and already something has been said with re-

spect to it, that the petition alleges that the defendant employs regu-
larly more than five workmen and did not avail itself of the
301 provisions of an Act of the General Assembly of the State of
Ohio creating a State Insurance Fund for the benefit of injured employes. This allegation is admitted, but you are instructed that the defendant was not bound to avail itself of the provisions of this act. It might or might not have done so; as the law stood at the time his cause of action arose, it was wholly optional with the defendant to avail itself of the provisions of this act or not, as it deemed best, and no inference of negligence on its part is to be inferred or assumed by you from the fact that it did not see fit to avail itself of the provisions of this act.

By reason of the provisions of this act which went into effect June 15, 1911, however, under the evidence and admissions in this case, certain common law defenses to an action for personal injury are not available to the defendant. That is, the defense of the fellow servant rule, the defense of the assumption of risk and the doctrine of contributory negligence is not available to the defendant in this case.

Without undertaking to define these defenses, it will be sufficient to say to you and you are instructed that if you find from the evidence and a preponderance of it, that the defendant was guilty of negligence which directly and proximately caused the injuries complained of by the plaintiff in his petition, your verdict will be for the plaintiff, even though you find the plaintiff casually shared with the
defendant or participated with the defendant in the act pro-
302 ducing the injuries of which the plaintiff complains. That
is, the plaintiff is not barred of recovery even if you find he casually shared with the defendant in producing the injuries or contributed to the causes or cause producing the injuries.

To bar the plaintiff of recovery, you must find that the injuries were caused wholly and solely by his own negligence and want of ordinary care and were the proximate result of his negligence and want of ordinary care. Secondly, if the act or cause proximately producing the injuries was the act of an officer, agent or employe of the defendant, your verdict will be for the plaintiff. That is, if you find from a preponderance of the evidence that the injuries the plaintiff complains of were directly and proximately caused by an act of an officer, agent or employe of the defendant, the captain or any other officer, even a deck hand of the defendant, your verdict will be for the plaintiff, irrespective of the fact whether such officer, agent or employe was the fellow servant of the plaintiff or not.

The negligence of any servant or employe of the defendant present at the time and participating in the work or being on duty upon the deck, if the negligence of such servant or employe proximately produced or caused the injuries of the plaintiff, would be the negligence of the defendant, under the pleadings in this action.

The plaintiff did not assume the risks ordinarily incident to the
business in which he was engaged at the time of the injury.
303 The acquiescence of an ordinarily careful man in the
known dangers of an employment are risks which he assumes by his contract of employment. Risks of this character, the plain-

tiff under the evidence in this case, did not assume, under the pleadings and under the law applicable to this case.

To be more specific, before the enactment of the statute creating a State Insurance Fund for the benefit of injured workmen, the law was in this state that a servant when he entered the service of an employer, impliedly agreed to assume all the risks, dangers and hazards ordinarily and naturally incident to the particular service in which he engaged that were known to him or which might have been known to him by the exercise of ordinary care.

Under the issues and the testimony in this case, you are instructed that the plaintiff did not assume these risks or dangers by reason of his contract of employment with the defendant.

The statute just referred to exempts him from the assumption of these risks or dangers. This is all that is meant by the instruction; that the doctrine of assumption of risk is not available to the defendant as a defense to this action.

You are to determine from all the evidence in this case what risks or dangers were ordinarily and naturally incident to the business in which the plaintiff was engaged at the time he claims he was injured,
taking into consideration the nature and character of the work
304 or business in which he was engaged at the time he claims he
was injured, or the risks that were ordinarily and usually incident to passing over the decks in going to his quarters or passing around for any necessary purpose, taking into consideration the nature and character of the work or business in which he was engaged at the time as disclosed by the evidence and circumstances surrounding the situation at the time.

The issue, therefore, gentlemen, is a simple one. If the plaintiff's injuries were the direct and proximate result of the negligence of the defendant, its officers, agents or employes, then your verdict will be for the plaintiff. If, on the other hand, you should find from the evidence that the act or cause directly and proximately producing the injuries complained of was solely the act of the plaintiff and that the defendant was not guilty of any wrongful act, neglect or default, then your verdict will be for the defendant. If the plaintiff, however, could have avoided the injuries by the exercise of due care under all the circumstances, it was his duty to do so.

You are further instructed that if you find from the evidence that the injuries of which the plaintiff complains were the result of a mere accident, as I have already defined that term, your verdict will be for the defendant.

If you find for the plaintiff, your verdict will be in his favor in such amount as will fairly or would fairly and fully compensate him for the injuries he has actually sustained as a direct and natural result of this injury.

305 The measure of damages is compensation, that is, actual damages. You should, in assessing damages, take into consideration the nature and extent of the injuries, as shown by the evidence, recalling it as far as you can, if you come to that question. What were the nature and character of these injuries? How many

fractures were sustained; what other injuries were sustained? Are they permanent or not?

You may take into consideration the pain and suffering this man has already endured, if the evidence shows that he has endured pain and suffering and such pain as the evidence has shown he may reasonably be expected to suffer as a natural and direct result of the injuries of which he complains, in the future.

You may also consider any permanent effect as a natural and direct result of the injuries of which he complains,—it must be the direct and natural result of it. Also any loss of health or strength which the evidence shows he has sustained as a natural and direct result of this injury of which he complains. Also any necessary expense, if the evidence shows that any expense has been incurred in procuring such recovery as he has procured.

You may also take into account the value of any time you believe from the evidence he has lost on account of such injury. You want to scrutinize this testimony very carefully. You will remember the testimony as it went in and you may consider the effect which
306 the injury will have upon him in the future and the effect upon his ability to work in the future. You should bear in mind that the nature and extent of the plaintiff's injuries, if any, their effect upon his health and their effect upon his ability to labor, are questions of fact and must be proven as all material questions of fact, by a preponderance of the evidence.

If you find for the plaintiff, you must not be influenced by sympathy or by any argument of counsel; this case should be considered by you gentlemen the same as if it were a contest between two persons of equal standing in the community. The fact that one of the parties is a corporation should not affect your minds in any way. You want to be just to the plaintiff, fairly just to the plaintiff and fairly just to the defendant. That is, if you find for the plaintiff when you come to a question of assessing damages.

There are two forms of verdict, gentlemen, one verdict for the defendant and one for the plaintiff, assessing his damages. You first take up the question of liability in this case. When nine of your number have agreed on that question, that will be your verdict. If nine of your number agree, come to a conclusion that there is a liability, that the plaintiff should recover, that will be your verdict on that question. You will then pass upon the next question, which is the amount of damages to be awarded. If nine of your
307 number come to the conclusion that there is no liability and that plaintiff should not recover, that will be your verdict.

When you come to bring your verdict into court, all of the jurors may sign if it they see fit, but nine of your number, gentlemen, will constitute a verdict. When you come to the question of damages, in discussing that among yourselves, agreeing upon the amount, nine agreeing on the damages, if you come to that question, that will be your verdict. You will then write your verdict out and bring it into court.

You may take the case, gentlemen.

Defendant's Exceptions.

1. The defendant excepts to what the Court said about the defendant not being exonerated from the insurance fund.

2. The defendant excepts to what the Court said about the custom and that the plaintiff would have to know the custom, because there is no evidence that the plaintiff knew of any custom.

3. The defendant excepts to what the Court said about the duty to give instructions if they knew that the plaintiff was inexperienced.

4. The defendant excepts to what the Court said about the accident being directly caused by the act of any officer.

5. The defendant excepts to what the Court said about the time being lost by the plaintiff and the expenses of a cure, there being no evidence of either.

308 6. The defendant also excepts to what the Court said about the effect of the injury upon the plaintiff and to his future incapacity of getting work, etc.

7. The defendant also excepts to what the Court said the custom was only read into the contract if both parties knew of it.

8. The defendant excepts generally to the charge of the Court under the statute.

9. The defendant also excepts to the refusal of the Court to give its request Number 1.

Thereupon the jury rendered a verdict in favor of the plaintiff, as appears by the record herein; to which the defendant then and there duly excepted.

Whereupon the defendant duly filed its motion for a new trial, which is part of the record herein, for the reasons and upon the grounds therein stated; and on the 4th day of April, A. D. 1914, said motion for a new trial came on to be heard by the Court and was argued by counsel; on consideration whereof the Court overruled the same; to which the defendant then and there duly excepted; and thereupon the Court entered judgment against said defendant in accordance with said verdict, as appears by the record herein; to which the said defendant then and there duly excepted.

And thereupon, on the 12th day of May, A. D. 1914, being within forty days after the overruling of defendant's motion for a
309 new trial, said defendant filed with the Clerk of said court, this, its Bill of Exceptions, and prays that the same may be allowed and signed by the Trial Judge and filed as a part of the record of this cause, but not spread at large upon the minutes, according to the statute in such case made and provided, the receipt of which is hereby acknowledged this 12th day of May, A. D. 1914.

EDMUND B. HASERODT,
Clerk of said Court,
By H. L. NICHOLAS,
Deputy Clerk.

And thereupon, on the 25th day of May, A. D. 1914, and being not less than ten nor more than fifteen days after the service of

notice of filing of this Bill of Exceptions, the same was duly transmitted to the said Trial Judge by the Clerk of said Court, together with all objections and amendments filed thereto, the receipt of which is hereby acknowledged this 25th day of May, A. D. 1914.

MARTIN A. FORAN,
Trial Judge.

309½ And now, upon the 27th day of May, A. D. 1914, being not more than five days after the receipt of said Bill of Exceptions from said Clerk, and upon due consideration of the same and the objections and amendments thereto, said Bill of Exceptions is hereby allowed and signed by the Court, and ordered to be made a part of the record of this cause, but not spread at large upon the minutes, according to the statute in such case made and provided, and it is ordered that the same be transmitted to the office of the Clerk of this Court forthwith.

All of which is accordingly done as of said term, and so ordered and directed.

MARTIN A. FORAN,
Trial Judge.

310 Does the Ohio Statute Providing for a State Insurance Fund Apply to a Ship and the Members of Her Crew Engaged Exclusively in Interstate Commerce?

The petitions in both cases contain averments that the respective plaintiffs were employed and became members of the crew of the Edwin N. Ohl at Manitowoc, Wisconsin. The evidence supports the allegations of the petitions, and proves the fact that Mraz is and was a citizen of Austria and a resident of Wisconsin, and that Wattawa is and was a citizen and resident of Wisconsin.

The evidence proves the further fact that the Edwin N. Ohl was a vessel duly enrolled and licensed by the United States and was on the date and at the time of this occurrence and at all times during seasons of navigation, engaged in interstate commerce; that during seven months of the year she was so engaged and during five months was not in commission, and while out of commission did not have employed upon her five seamen, operatives or workmen.

The petition sets up that the owner of said steamer in her operation regularly employed more than five workman and was not a contributor to the state insurance fund of Ohio. The original answer set up the defenses of contributory negligence and assumption of risk. Motion was made by plaintiff to strike out the language making such defenses because defendant had not contributed to the state insurance fund. The motion was sustained. It is only fair to the Common Pleas Court, however, to state that the matter was not briefed nor argued, and in the hurry of trial work was probably not given the consideration it deserved, because we feel sure that the court upon mature consideration would have been convinced that the motion should have been overruled.

311 A number of questions are presented to this court growing out of the issues and the undisputed facts that these were contracts of employment between a citizen of Ohio and citizens of a foreign country and of another State, both of whom were residents of such other State; that both contracts were made in another State, and there was no specified place of performance, but all services were to be rendered to this vessel while she was to be and was engaged in interstate commerce under the laws of the United States.

In the discussion of the questions thus arising, we can assume it will not be controverted that there was at the times mentioned in the petition a general maritime law; that this law prescribed and governed the rights, duties and liabilities of a ship to its crew and of the crew to their ship; that this law operates uniformly in and throughout the whole country.

We may further assume without fear of contradiction that the contract between a seaman and the vessel he ships upon "is a maritime contract and establishes their relation as well in courts of law as in courts of admiralty". (179 Fed., 293.)

Our experience has been that when actions are tried in our State courts, involving the respective relations and duties of seamen to the vessels and those vessels and their owners to seamen, the court is at once in confusion of doubt as to the law applicable to the case, and usually resolves the doubt by adhering to the law it is most familiar with, jumping to the conclusion that the maritime law is not for recognition and enforcement in courts of law, but in courts of admiralty only.

The importance of securing a correct determination of the questions here presented justifies us, we think, in making a full if not complete, presentation of our views on the subjects. And
312 it is self-evident that to all of the many vessel owners and seamen it is of great importance to know whether the Ohio Act is to govern, or the National Maritime law, which has always governed is to continue to do so, because they are so opposed and conflicting that both can not be controlling.

The National Maritime Law has always governed the reciprocal rights, duties and liabilities of ship and seamen, and the ordinary relation of ship and seamen obtains in the present case. Such rights, duties and liabilities are well defined by numerous decisions and have long been well settled.

The Osceola, 189 U. S., 158:

"The law both in England and America is settled as to the following propositions:

(1) That a vessel and her owners are liable, in case a seaman falls sick or is wounded in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.

(2) That the vessel and her owners are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure

to supply and keep in order the proper appliances appurtenant to such ship.

(3) That all the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure.

(4) That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received from negligence or accident".

It will be seen that this maritime law is more humane than the common law, which does not create a duty for performance by the master to maintain and cure, when cure can be effected, if the injuries to the servant be the result of his negligence or of accident, nor in such case is he entitled to wages.

It will also be noted that it requires the owners to have a seaworthy vessel and to supply and keep in order her appliances, as the common law requires.

313 It will be seen that when the vessel owner performs these duties, and the ship is sent on its voyage, beyond the place at which the owner may have supervision and control of the ship, that all members of the crew are fellow-servants except perhaps the master. The law recognizes the inability of the owner to look after the safety of the men in a hazardous undertaking when the vessel may perhaps be at the other end of the earth. It recognizes the fact that many of the dangers are made by a higher power; that these dangers cannot be avoided and cannot be lessened when the ship is seaworthy. It recognizes that these seamen must be sent into danger for the safety of the ship, her crew and cargo. How different is the situation on land. There the owner can have supervision of the workman and his work. There he can discharge a careless, negligent fellow workman or superior servant. There the elements of nature and the attendant dangers are not to be met and combated. In short, so many are the differences between a seafaring life and that upon land, that the wisdom of the ages has created this maritime law to meet conditions existing upon the sea. Is it to be overturned in one way by the State of Ohio, changed in another way by the State of New York, emasculated by the State of Michigan, ignored by the State of Wisconsin, and upset or twisted by other States on our vast seaboard? Are the duties no longer to be reciprocal? These and other questions ought to be worthy of much thought by this court. It was, and is, a general principle of the common law, dictated by reason and justice, that one servant cannot claim compensation from the master for injuries inflicted by another servant or resulting from the negligence of the latter. This principle, modified by the doctrine of respondeat superior, has been affixed to the law of Ohio. The principle is particularly applicable in the case of seamen, to whom, as a crew, is entrusted the safety of a ship, the shipping and

314 carrying of her cargo. Says the Supreme Court in

The Iroquois, 194 U. S., 240, 243:

"A seafaring life is a dangerous one. Accidents of this kind are pretty liable to occur and the general principle of law that a person entering a dangerous employment is regarded as assuming all ordinary risks of such employment, is particularly applicable to the case of seamen".

The Santa Clara, 206 Fed., 179, 180:

"The relation of seamen to ship owners is peculiar. By the maritime law the seaman injured in the service of the ship is entitled to wages and maintenance and cost of cure, at least to the end of the voyage, without any reference whatever to the question of negligence either upon his own part or upon that of his fellow servants or upon that of the owners. The single exception grafted out of humanity upon the law of the sea, is to give the seaman indemnity from the vessel where his injuries resulted from unseaworthiness of the ship".

And it will be seen that out of this peculiar relation has grown reciprocal duties, unlike those, in some particulars, of master to servant on land, and that the contract between them is a "maritime contract" and establishes their relations in courts of law and in courts of admiralty. Thus it was said in

Cornell Steamship Co. v. Fallom, 179 Fed., 293, 294:

"The contract between the defendant and the deceased is a maritime contract and establishes their relation as well in courts of law as in courts of admiralty. A seaman injured in the service of the vessel has a right to recover against the vessel and her owners for his wages and the expenses of his maintenance and cure to the end of the voyage, or as long as he has a right to wages, whether he is or they are guilty of negligence or not. And this is the extent of his right to recover. There is an exception, apparently a departure from the maritime law but established by so many decisions that the Supreme Court has declined to disturb it, namely, that if the seaman's injury is due to the personal negligence or default of the ship owners, as, for instance, to the unseaworthiness of the vessel or her tackle, or failure to supply proper medical treatment and attendance, he may recover full indemnity".

If this Ohio statute be applicable in this case, then it will effect the abrogation of the whole policy of the law as laid down in the foregoing decisions, for it is evident the maritime law has established reciprocal relations and duties, and there can be no reciprocity where owner has imposed upon him increased responsibilities
315 and the seaman is relieved of all responsibility. This is the result when the statute denies to the owner the defenses of assumption of risk, contributory negligence and negligence of a fellow-servant. So, too, must fall the beneficient law that a seaman injured in the service of his ship is entitled to maintenance and cure at the expense of the ship, regardless of the seaman's negligence, unless it was absolutely willful.

Therefore the first question for the court to decide is whether the

State law or the National Law shall govern, because if the National law is to govern, the trial court was in error in not overruling the motion to strike out these defenses, and there must be a reversal.

316 We will discuss this question under the following heads:

I. What is the national maritime law?

II. Does the national maritime law govern rights, duties and liabilities as between a ship and crew?

III. Does the national maritime law apply to a ship and crew on the public navigable waters of the United States within the body of one of the states, to the exclusion of a conflicting statute of that state?

I. What is the national maritime law?

Our system of maritime jurisprudence was brought to America by the early settlers as a part of their heritage and courts for the administration of the maritime law were commissioned in many if not all of the colonies. These tribunals declared and enforced the general maritime law as it then existed and continued the exercise of such powers until the organization of the national government. In considering the division of powers between state and nation, it seems to have been conceded on every hand that maritime matters should properly be left to the national government. The celebrated authors of the Federalist, while the Constitution was pending before the steps for ratification, affirmed that: "The most bigoted idolizers of State authority had not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes." Accordingly the Constitution was made to provide that the judicial power of the United States should extend to all cases of admiralty and maritime jurisdiction. Mr. Chief Justice Jay in Chisholm v. Georgia, 2 Dall., 419, 475; 1 U. S. (L. Ed.), 440, in giving a comprehensive summary of the power conferred upon the national government, says that it extends:

"to all cases of admiralty and maritime jurisdiction; because as the seas are the joint property of nations whose rights and privileges relative thereto are regulated by the law of nations and treaties, such cases necessarily belong to the national jurisdiction."

317 There was, therefore, a well recognized body of maritime law in existence at the time of the organization of this government and such body of maritime law was adopted by and became the national maritime law of this country. At least it is beyond argument that so much of it became our national maritime law as was suitable to our conditions, and the decisions of the Supreme Court of the United States show that the general maritime law governing the rights and liabilities of ship and seamen was suitable and was adopted. The situation was well summarized in the Lottawanna, 21 Wall., 558: The first five syllabi are as follows:

"1. Whilst the general maritime law is the basis of the maritime law of the United States, as well as of other countries, it is only so far operative in this, or any country, as it is adopted by the laws and usages thereof. It has no inherent force of its own.

2. In particular matters, especially such as approach a merely municipal character, the received maritime law may differ in different countries without affecting the general integrity of the system as a harmonious whole.

3. The general system of maritime law which was familiar to the lawyers and statesmen of this country when the Constitution was adopted, was intended, and referred to, when it was declared in that instrument, that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.' Thus adopted, it became the maritime law of the United States, operating uniformly in the whole country.

4. The question as to the true limits of maritime law and admiralty jurisdiction is exclusively a judicial question, and no State law or act of Congress can make it broader or narrower than the judicial power may determine those limits to be. But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends on what has been received as law in the maritime usages of this country, and on such legislation as may have been competent to affect it.

5. The decisions of this court illustrative of these sources, and giving construction to the laws and Constitution, are especially to be considered; and when these fail us, we must resort to the principles by which they have been governed."

We started, therefore, with a well recognized body of maritime law which was as much national law of this country as if subsequently re-enacted by congressional legislation. The very
318 language of the Constitution of the United States in Section 2, Article 3, shows that there must have been a well recognized body of admiralty and maritime law, else why give exclusive jurisdiction of it to the national government. As was said in The Lottawanna, Supra, at page 574:

"That we have a maritime law of our own operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction'."

American Insurance Co. v. Canter, 1 Peters, 511, 546:

"A case in admiralty does not in fact arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law admiralty and maritime as it has existed for ages is applied by our courts to the cases as they arise."

True, Congress has enacted a great deal of legislation adding to or changing in parts this great body of maritime law, such as establishing the United States Steamboat Inspection Service, statutes regulating the employment, care and discharge of seamen, the limited liability acts, the Harter Act and many other specific acts, but these were merely changes or additions to the great body of maritime law

which was adopted by the fathers on the formation of our government. It cannot be said that we have no national maritime law except that since enacted by Congress, because if this were so the great majority of situations arising in maritime affairs would not be covered at all, as the statutes only take care of specific instances.

The national maritime law of the United States, therefore consists of the great body of well recognized maritime law which existed at the time of the formation of our union, jurisdiction over which was by the Constitution vested in the national government
319 and the specific legislation enacted by Congress since, as both of these have been construed and expounded by our tribunals. In case we want to know what the maritime law is in regard to something which has not been the subject of specific enactment by Congress, we must look to the decisions of our tribunals construing and expounding the principles of the general maritime law adopted on the formation of our government, and this general maritime law which has become our national maritime law has all the force and effect of specific legislation by Congress.

This is the crucial point which must decide the present question, because if this body of general maritime law adopted at the formation of our government has the same force and effect as Congressional enactments since then, then we have a national law prescribing the liability of a ship to a seaman injured thereon and the states cannot pass acts in derogation thereof.

In this connection we refer the court to the case of Murray v. Chicago & Northwestern Ry. Co., 62 Fed., 24, where Judge Shiras, afterward Associate Justice of the United States Supreme Court, shows by careful reasoning that the law maritime adopted by the Constitution is to be given the same effect as Congressional legislation and that a state cannot pass acts derogatory thereto.

"The adoption of the constitution of the United States and the consequent creation of the national government did not abrogate the common law previously existing; nor did the division provided for by the constitution, of governmental powers and duties between the national and state governments, deprive the people of the benefits of the comman law; as to such matters as thereby were committed to the control of the national government, there were applicable the law of nations, the maritime law, the principles of equity, and the common law, according to the nature of the particular matter, the common law applicable to such matters being based on the common law of England, as modified by the surroundings of the colonists,
320 and as developed by the growth of our institutions since the adoption of the constitution, and the changes in the business habits and methods of our people; and the binding force of the principles of this common law, as applied to such matters, is not derived from the action of the states, and is no more subject to abrogation or modification by state legislation than are the principles of the law of nations or of the law maritime."

Beginning page 41 the language of the court is as follows:

"The conclusion I reach upon this subject is that at the time of the separation of the colonies from the mother country, and at the

time of the adoption of the constitution, there was in existence a common law derived from the common law of England, and modified to suit the surroundings of the people; that the adoption of the constitution and consequent creation of the national government did not abrogate this common law; that the division of governmental powers and duties between the national and state governments provided for in the constitution did not deprive the people who formed the constitution of the benefits of the common law; that, as to such matters as were by the constitution committed to the control of the national government, there were applicable thereto the law of nations, the maritime law, the principles of equity, and the common law, according to the nature of the particular matter; that, to secure the enforcement of these several systems when applicable, the constitution and congress, acting in furtherance of its provisions have created the supreme court of the United States and the other courts inferior thereto, and have conferred upon these courts the right and power to enforce the principles of the law of nations, of the law maritime, of the system of equity, and of the common law in all cases coming within the jurisdiction of the federal courts, applying, in each instance, the system which the nature of the case demands; that, as to all matters of national importance over which paramount legislative control is conferred upon congress, the courts of the United States (the supreme court being the final arbiter) have the right to declare what are the rules deducible from the principles of general jurisprudence which control the given case, and to define the duties and obligations of the parties thereto; that the common law now applicable to matters committed to the control of the national government is based upon the common law of England, as modified by the surroundings of the colonists, and as developed by the growth of our institutions since the adoption of the constitution, and the changes in the business habits and methods of our people; that the binding force of the principles of this common law, as applied to matters affecting the entire people; and placed under the control of the national government, is not derived from the action of the states, and is no more subject to abrogation or modification by state legislation than are the principles of the law of nations or of the law maritime."

These principles have been approved by the Supreme Court
321 of the United States in Western Union Telegraph Co. v. Call Publishing Co., 181 U. S., 92, where the court held that the common law as it existed at the formation of our Government, except as changed by Congress, is operative upon all interstate commerce.

"Properly understood, no exceptions can be taken to declarations of this kind. There is no body of Federal common law separate and distinct from the common law existing in the several States in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several States. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transac-

tions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress.

What is the common law? According to Kent: 'The common law includes those principles, usages and rules of action applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature'. 1 Kent, 471. As Blackstone says: 'Whence it is that in our law the goodness of a custom depends upon its having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it its weight and authority; and of this nature are the maxims and customs which compose the common law, or lex non scripta, of this kingdom. This unwritten, or common, law, is properly distinguishable into three kinds: 1. General customs; which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification'. 1 Blackstone, 67. In Black's Law Dictionary, page 232, it is thus defined: 'As distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England.'

Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law, as so defined, and are subject to no rule except that to be found in the statutes of Congress? We are clearly of opinion that this cannot be so, and that the principles of the common law are operative upon all interstate commercial transactions except so far as they are modified by Congressional enactment."

322 The same principles as applied to the maritime law were announced in The Lottawanna, Supra. At page 574 the court say:

"That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.' But by what criterion are we to ascertain the precise limits of the law thus adopted? The Constitution does not define it. It does not declare whether it was intended to embrace the entire maritime law as expounded in the treaties, or only the limited and restricted system which was received in England, or lastly, such modification of both of these as was accepted and recognized as law in this country. Nor does the Constitution attempt to draw the boundary line between maritime law and local law; nor does it lay down any criterion for ascertaining that boundary. It assumes that the meaning of the phrase 'admir-

alty and maritime jurisdiction' is well understood. It treats this matter as it does the cognate ones of common law and equity, when it speaks of 'cases in law and equity,' or of 'suits at common law', without defining those terms, assuming them to be known and understood."

These principles have been in terms stated or in fact recognized in many cases and the latest expression on the subject was by Judge Killits in the Northern District of Ohio, Eastern Division, in the case of George Schuede v. The Zenith S. S. Co., 216 Fed. 566, copies of which opinion will be furnished to the court if it has not been printed in the regular reports by the time this case reaches argument. This was an action at law by a seaman for an injury, which occurred while moored to the dock in Cleveland, Ohio. It was brought in the State Court, expressly setting up the Ohio Employers' Liability Act, was removed to the Federal Court and there answer was filed setting up that the employment as seaman was a maritime matter and the rights and liabilities of the parties should be governed by the general maritime law. Motion was made to strike out these allegations so that the court had for consideration the very same questions
323 which we have in the present case. This was an action at law, therefore, and removed to the law side of the federal court and the court said it would have to be decided as if still in the state court. Notwithstanding it was treated in every respect as a law case, the court held that the rights and liabilities of the parties must be decided by the law maritime. On this phase of the subject the court said:

"That the principles of the general maritime law in force in the United States and not the subject of specific enactment by Congress, are to be treated as if actually on the statute books. This must be construed to be the effect of Section 2, Article 3 of the Constitution extending the power of the federal courts 'to all cases of admiralty and maritime jurisdiction', thus practically adopting the general law of admiralty as the law in this country, and such general law in force when the Constitution was adopted and not modified by act of Congress has the same force and is to be treated with the same consideration as must be given to statutes upon the subject."

It will no doubt be argued that when Congress has not legislated on any subject, that the states have a right to do so and their acts will be given effect until Congress does legislate. We recognize the principle, but contend that it has no application here. If there was no national law upon the subject and Congress had not legislated, there might be some room for the application of the principle, but we have a national law on the subject which has all the force and effect of an act of Congress. We submit, therefore, that the national maritime law is not only the specific acts of Congress relating to such matters and which in fact would only cover a very small proportion of maritime affairs, but also includes the general maritime law recognized by our lawyers and statesmen at the adoption of the Constitution and by the express language of that Constitution made our national maritime law, which has all the force and effect of any acts of Congress passed since.

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II.

Does the National Maritime Law Govern Rights, Duties and Liabilities as Between a Ship and Crew?

A ship is not complete without her complement of crew. As was said by Hughes in his work on Admiralty, page 21;

"The contracts of seamen have always been considered among the most important in the admiralty, as a good crew is the most important outfit that a ship can have. Her construction may be the best that modern ingenuity may produce. Every device of recent navigation may be lavished upon her, yet unless she has a brain to direct her course and skillful hands to regulate the pulsations of her engines and manage her numerous complicated machinery, her propeller is paralyzed, her siren is dumb. She is like the human body when the soul has departed. Mere machinery is of but little service unless intelligently handled. It is not the gun but the man behind it that is formidable; and in modern as in ancient times the personal equation is still controlling."

Ships were made to plow the sea, and to lie at the wall and rot.

But she could not do much plowing without her crew, so that we say she cannot serve the purposes of a ship and is not a complete ship without her crew. The relation between ship and crew, therefore, must be the strictest kind of a maritime matter, as the crew is part of the complement to make a complete ship.

At the expense of repetition, we again call the court's attention to the fact that plaintiff came aboard the ship in Manitowoc, Wisconsin, and was there hired by one of the mates to serve on the ship as seaman. It was the regular maritime contract, evidenced by signing ship's articles establishing the usual relation between ship and crew.

There has been much Congressional legislation governing the rights and liabilities of ships and seamen in certain respects.

325 For instance, there must be shipping articles in a form carefully prescribed by the United States Government. There are many provisions as to wages and method of payment; provisions forbidding assignment or attachment; also regulating the character and amount of food, medicine, etc., with which a seaman must be furnished; the amount of space he must be allowed and the method of his treatment as to punishment, forfeiture of wages, etc.; the method of his discharge and return to this country as carefully defined, and many other matters establishing the rights and liabilities as between ships and seamen. This merely emphasizes the fact that the rights and liabilities as between ship and seamen are now and always have been treated as a matter of national concern and not a concern of each state. In fact we doubt if any state legislation will be found on the subject. This does not mean, however, that these United States statutes exhaust the subject and that there are no rights and liabilities except those specifically prescribed. There are many such rights and liabilities well known and enforced by both national and state tribunals by virtue of the national maritime

law which do not get their sanction from statutes but from the general maritime law. For instance, a seaman is not required to give security for costs in filing suit; he has a lien for his wages prior to almost any other sort of claim; he is entitled to maintenance and cure at the expense of the ship even if injured by his own negligence. These and many other rights are not by virtue of Congressional enactment, but they are just as much the law of this country as if they had been specifically enacted and no state could pass acts cutting off these rights given by virtue of the national maritime law.

326 Is the relation between ship and seamen any less maritime than the relation between ship and cargo? It will hardly be contended that it is. In fact it would be hard to conceive of a relation more strictly maritime than that between a ship and her crew. Yet it is a fact, and probably will be so conceded, that the national maritime law governs the rights and liabilities between ship and cargo. There are some United States statutes concerning these matters, such as the Harter Act and the limited liability acts, but the great majority of situations that arise as to ship and cargo, general average, salvage, etc., are governed not by statute but by our national maritime law as adopted at the time of the formation of our government and crystalized by the decisions of our courts since, and even the statutes which have been enacted by Congress are pretty largely merely declaratory of the general maritime law.

Butler vs. Boston S. S. Co., 130 U. S., 527, 556, where the court says, speaking of the limited liability statutes: "Congress has restored that article to our maritime code".

If ship and cargo are governed by our national maritime law, why not ship and crew, which is even more a maritime matter? We submit that not only on principle should this be so, but the policy of our government has always been to leave it to the general maritime law because of its national character of its relation to commerce.

Chisholm vs. Georgia, supra.

"Because as the seas are the joint property of nations whose rights and privileges relative thereto are regulated by the law of nations and treaties, such cases necessarily belong to national jurisdiction."

The principles of the general maritime law have from the beginning of commerce and navigation governed liabilities as
327 between ship and crew and these principles were adopted by us and are just as much a part of our present law as if specifically enacted by Congress.

The Osceola, supra.

In the Osceola case it will be found that the Supreme Court, after considering and reviewing all the maritime codes and our own previous decisions as the proper source to look for the sanction governing the rights and liabilities between ship and crew, summarized the rules to govern in our country as hereinbefore set forth. The court did not look to statutes to find this authority, but drew the principles from the general admiralty law as adopted and enforced

in our country and from this source alone laid down the principles governing the rights and liabilities as between ship and seamen. This expression by the Supreme Court of the United States has ever since been accepted as the law governing the relation of ship and crew. That the relation between ship and seamen is governed by our national maritime law as thus expounded in The Osceola case in both admiralty and law courts, has been held in many cases.

Horn v. The George H. Hammond, 71 Fed., 314, 316.
The Charles H. Klinck, 172 Fed., 1019.
Cornell S. S. Co. v. Fallom, 179 Fed., 293, 294.
The P. P. Miller, 180 Fed., 288.
The Bunker Hill, 198 Fed., 587.
The Nyack, 199 Fed., 383.
The New York, 204 Fed., 764, 765.
The Santa Clara, 206 Fed., 179, 180.
Thompson Towing Co. v. McGregor, 207 Fed., 209.
The C. S. Holmes, 209 Fed., 970.
Scarff v. Metcalf, 107 N. Y., 211.
Gabrielson v. Waydell, 135 N. Y., 1.
Schuede v. Zenith S. S. Co., supra.

The last expression on the subject which we have been able to find is in

Atlantic Transport Co. v. Imbrovek, 234 U. S., 52, 61, Advance Sheet U. S. Reports, Vol. 234, No. 1, July 5, 1914.

328 The court there say:

"Even with respect to contracts where subject-matter is the exclusive test, it has been said that the true criterion is 'whether it was a maritime contract having reference to maritime services or maritime transactions.' Insurance Co. vs. Dunham, 11 Wall., 1, 26. The Constitution provides that the judicial power shall extend 'to all cases of admiralty and maritime jurisdiction' and the act of Congress defines the jurisdiction of the District Court with respect to civil cases in terms of like scope. To hold that a case of tort committed on board a ship in navigable waters by one who has undertaken a maritime service against one engaged in the performance of that service is not embraced within the constitutional grant and the jurisdictional act would be to establish a limitation wholly without warrant."

We submit, therefore, that as a ship is not a complete ship without her crew, that the relation between a ship and crew is the strictest kind of a maritime relation and that the rights, duties and liabilities of ship and crew always have been and ought to be governed by the national maritime law.

III. Does the national maritime law apply to a ship and crew on the public navigable waters of the United States within the body of one of the States, to the exclusion of the conflicting statute of that State?

At the time of this accident the Ohl was lying in the port of Sandusky on Sandusky Bay, an arm of Lake Erie.

The decisions are to the effect that the Great Lakes are the same as high seas so far as the navigation is concerned.

The Genesee Chief, 12 How., 443.
The Daniel Ball, 10 Wall., 557.
Insurance Co. v. Dunham, 11 Wall., 1.
Bridge v. U. S., 105 U. S., 470.
Escanaba v. Chicago, 107 U. S., 678.
Manchester v. Massachusetts, 130 U. S., 248.
Harmon v. Chicago, 147 U. S., 396.
Illinois Central v. People, 149 U. S., 387.
United States v. Rogers, 150 U. S., 249.

That Sandusky Bay at the place in question is navigable in fact is, of course, shown by the fact that these large modern lake steamers do navigate to the place where the accident hap-
329 pened. Indeed, much further up than the place in question Sandusky Bay has been decided to be public navigable waters of the United States.

Bodi et al. v. Winous Point Shooting Club, 57 O. S., 226:

Also the ordinance of 1787 for the government of the Northwest Territory, of which Ohio and Sandusky Bay is geographically a part, provided that

"The navigable waters leading into the Mississippi and the St. Lawrence and the carrying places between the same shall be common highways and forever free as well to the inhabitants of said territory as to the citizens of the United States and those of any other state that may be admitted into the confederacy, without any tax, impost or duty therefor."

Plaintiff recognizes these facts by setting forth in the petition that the Ohl was engaged in "carrying bulk freight upon the Great Lakes, their connecting and tributary waters." As these Great Lakes, their connecting and tributary waters, are high seas so far as the application of maritime law is concerned, and as Sandusky Bay is part of the high seas and public navigable waters of the United States, the maritime law should govern the maritime matters on such waters.

The Lottawanna, 21 Wall. 558, 575:

In speaking of the maritime law the court says:

"One thing, however, is unquestionable: the Constitution must have referred to a system of law coextensive with and operating uniformly in the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states."

Also in Butler v. Boston S. S. Co., 130 U. S., 527, 557, the court say:

"It being clear, then, that the law of limited liability of ship

owners is a part of our maritime code, the extent of its territorial operation (as before intimated) cannot be doubtful. It
330 is necessarily coextensive with that of the general admiralty and maritime jurisdiction and that all the settled law of this country extends wherever public navigation extends—on the sea and the great inland lakes and the navigable waters connecting therewith."

The court cites

Warrington v. Clark, 5 How., 441.
The Genesee Chief v. Fitzhugh, 12 How., 443.
Johnson v. Magnolia, 20 How., 296.
Commercial Transportation Co. v. Fitzhugh, 1 Black., 574.

To show the connection, we again call the court's attention to the following points: that plaintiff was hired by an officer of the Ohl on the Ohl at Manitowoc, Wisconsin, thereby establishing the regular relation of ship and seamen; that the accident happened on the public navigable waters of the United States while plaintiff was serving as a member of the crew of a ship regularly enrolled and licensed by the United States Government and engaged at the time in interstate commerce; that we have a national maritime law which governs the liabilities as between ship and seamen, which is coextensive with the public navigable waters of the United States.

With this premise we come to the final question: Can a state pass an act diametrically opposed to the national maritime law and the national policy heretofore followed, and change not only the whole course of procedure, but also fundamental rights?

The Ohio act creating a state insurance fund does not in terms apply to ships and seamen, and we doubt very much whether any legislator concerned in its passage ever intended that it should. Some of them must perforce have considered the English workmen's compensation act. The English act expressly includes ships and seamen, but the court must remember that this is a national act passed by Parliament. In this country there would be no doubt of the right of Congress to pass such a national act and change the national maritime law. The very fact that Ohio has not attempted to include ship and seamen when some at least, if
331 not all of the legislators must have been familiar with the English act, as well as other state acts previously passed, is a tacit recognition that it is a matter to be regulated by national law and not by the various states. If the language of this act is examined we submit that nothing will be found to indicate that it was intended to apply to a ship and seamen and that construing it so as to thus extend it will hardly be justified. Section 20-1 contemplates the employment of five or more regularly in this state. True, it does not use the words "in this state" in Section 20-1, but Section 20-2 specifies five or more workmen or operatives regularly in the same business in this state, and while the act has been amended as to Sections 20-1 and 20-2, all of the amendments show that it is only to apply in this state. Section 51 provides as follows:

"The provisions of this act shall apply to employers and their

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employes engaged in intra-state and also interstate and foreign commerce for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intra-state work may and shall be clearly separable and distinguishable from interstate or foreign commerce, and then only when such employer and any of his workmen working only in this state," etc.

This section, which is the only section in any way appertaining to interstate commerce, shows that there is no attempt to deal with anything that is not exclusively within the state, but even if it did not, it must be read into the act, as it would apply nowhere else but in this state, as a state act could have no extra-territorial effect.

A consideration of Section 51 shows that the act was not intended to apply to a situation like the present. The legislature evidently had in mind the national employers' liability act applied to railroads and wanted to leave no question of attempting to entrench upon such act. The national maritime law having the same force and effect as the national employers' liability act relating to railroads, the same reason and language would apply to the
332 present situation. The plaintiffs were not employed in this state; they were not working in this state in the proper sense of the word, but were members of the crew of a ship engaged in interstate commerce which had no connection with intra-state commerce, or if it had, they are not clearly separable and distinguishable and a rule of liability has been established by the United States governing the situation.

Further, these ships do not employ five or more regularly in this state. The owner may be a citizen of this state and the ship may never come within the state, and even if she did, she may never employ a man therein. If employment means more than the act of hiring and includes any service of the employes, then no ship engaged in interstate commerce as the Ohl was, employs them regularly in this state. They may never be in this state during the sailing season, or if they are, they are here today and gone tomorrow and may never come back to Ohio. If they did come to an Ohio port again, it would only be as the chances of trade might bring her, and nothing could be conceived of which might be any more irregular than the coming of a lake freighter within the state of Ohio. But even if she came to an Ohio port every trip, she would not be employing men regularly in the State of Ohio, as the
333 only navigates about seven months of the year and if she makes fifteen trips, which would be about the average, she would be in Ohio only fifteen times during the year, and then for only a day or so at a time. It would be hard to conceive of a more discriminatory act than to make a ship, which may be in Ohio only once and which is within the state of Ohio only about fifteen days of the season at the best, pay on just the same basis as an employer regularly employing workmen in Ohio from year end to year end.

Beside this, she would have to comply with the act of every other state on the Great Lakes, or if the doctrine of state territoriality is to

apply, a boat owned by an Ohio owner, would have to comply but a boat owned by an owner in a jurisdiction where there was no such act could engage in the same trade and carry the same class of men, employed in the same places, in the same manner, at the very same service, and would not have to carry the burden of contributing to the Ohio fund and would not be cut out of its defenses of the fellow servant doctrine, assumption of risk or contributory negligence. If any better plan could be devised to drive vessel owners out of the State of Ohio, we should be glad to learn of it. We fully understand that this court is not concerned with what the result might be, but we are urging this merely as showing that the act was never intended to include ships and seamen, as the legislature surely would never intend the result of driving all ships away from the state of Ohio.

If, however, the legislature did intend the act to apply to ships and seamen, or if by a forced construction or an unfortunate choice of language it does apply, then we submit that the act is unconstitutional and void, because a state cannot pass an act in contravention of the national law on the same subject and this act is
334 in contravention of the national maritime law. It is in contravention of the well known and established policy of our national government and it is in contravention of the commerce clause of the Constitution of the United States.

It probably will be conceded that if this same action were brought in the United States District Court on the admiralty side, that the state statute could not apply.

The Manhasset, 18 Fed., 918:

Syllabus 3. "The states of this Union cannot create maritime rights, or rights of action in admiralty; nor can they endow with a maritime right one who is not entitled to that right by the law maritime."

In its opinion at page 922 the court says:

"From all that has been said, these things would seem to be clear: First, that the maritime law, existing as it does by the common consent of nations, and, being a general law, cannot be changed or modified as to its general operation by any particular sovereignty; second, that it has force in any country only by its adoption, express or implied, by that country, and may be modified in its special operation in that jurisdiction at the will of that special sovereignty; third, that it is by such adoption part of the federal law of the United States, and incapable of modification by state enactment—Congress having exclusive power, under the constitution, 'to regulate commerce with foreign nations, and among the several states, and with the Indian tribes'; and the judicial power of the United States, 'exclusive of the state courts', extending 'to all cases of admiralty and maritime jurisdiction'."

The City of Norwalk, 55 Fed., 98:

This was a decision by Judge Addison Brown, whose opinions in any matters relating to maritime affairs have always been given the greatest weight. The syllabus is as follows:

"The law administered in the admiralty courts of this country embraces not merely what is peculiar to the maritime law, but also much of the municipal local law, derived from the constituted order of the state, and all competent state and national legislation. What is peculiar to the maritime law, or that which by its interstate or international relations would be incompatible with diverse state legislation, can be changed by Congress alone, which, by implication, has the general power of legislation on the maritime law. This does not exclude state legislation upon maritime subjects of a local
335 nature, nor legislation under the police power for the preservation of life or health, not incompatible with interstate and intenational interests, in the absence of legislation by Congress. A state statute giving damages for death by negligence, as applied to a negligent collision on navigable waters within the state, does not infringe those conditions, and is valid."

The language of the court, beginning at page 106, shows that the workmen's compensation acts are not the sort of statutes referred to as not excluded because not in conflict with the national maritime law.

"This view, however, does not exclude state legislation upon matters of merely local concern, which can be much better cared for under state authority, and which have always been thus cared for; nor does it exclude general legislation by the states, applicable alike on land and water, in their exercise of the policy power for the preservation of life and health, though incidentally affecting maritime affairs; provided that such legislation does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations. The long-established doctrine in the Supreme Court has been that in this field of 'border legislation' state laws are valid until Congress interposes, and thereby excludes further state legislation. The Lottawanna, 21 Wall., 558, 581; Cooley v. Port aWrdens, 12 How. 299; County of Mobile v. Kimball, 102 U. S. 691, 697-699; Bowman v. Railroad Co., 125 U. S. 507, 8 Sup. Ct. Rep. 689, 1062; Leisy v. Hardin, 135 U. S. 100, 120-122, 10 Sup. Ct. Rep. 681; Manchester v. Massachusetts, 139 U. S. 240, 266, 11 Sup. Ct. Rep. 559; Ficklen v. Taxing Dist., 145 U. S. 1, 12 Sup. Ct. Rep. 810. There is no reason why local state legislation should be deemed any more restricted by the implied power of Congress over maritime legislation, than it is by the express grant of the commercial power. That the rule should be the same on each subject was intimated by Chief Justice Marshall in U. S. v. Bevans, 3 Wheat. 385, and by Mr. Justice Curtis in Smith v. State of Maryland, 18 How. 71, 76. The subject has been but little discussed, as compared with the frequent review of the commercial power of Congress and its limitations.

The instances, however, in which new legal rights, created by state authority in maritime affairs, have been recognized and enforced, are numerous and diverse. They embrace—First, liens for supplies to domestic vessels, (The Lottawanna, 21 Wall. 558;) second, liens for master's wages, (The Mary Gratwick, 2 Sawy. 342, affirmed by Mr.

Justice Field; The Louis Olsen, 52 Fed. Rep. 652; The J. E. Rumbell, (March 6, 1893) 13 Sup. Ct. Rep. 498;) third, liens for damages for refusing to load under a charter, (The J. F. Warner, 22 Fed. Rep. 342, by Mr. Justice Brown;) fourth, liens for double wharfage, (The Virginia Rulon, 13 Blatchf. 519;) fifth, actions for half pilot-
336 age where a pilot's services were refused, (Ex parte McNiel, 13 Wall. 236, and Ex parte Hagar, 104 U. S. 520, re-affirming Cooley v. Port Wardens, supra;) sixth, liens for expenses of seamen at a quarantine hospital, (The Wensleydale, 41 Fed. Rep. 829;) seventh, regulations as to rivers, harbors, and wharves, (County of Mobile v. Kimball, supra; Esdanaba & L. M. Trasp. Co. v. Chicago, 107 U. S. 678, 2 Sup. Ct. Rep. 185; Transportation Co. v. Parkersburg, 107 U. S. 691, 701-704, 2 Sup. Ct. Rep. 732; Packet Co. v. Keokuk, 95 U. S. 80; Packet Co. v. Aiken, 121 U. S. 444, 7 Sup. Ct. Rep. 907; Steamship Co. v. Pennsylvania, 122 U. S. 326, 346, 7 Sup. Ct. Rep. 1118; eighth, penalties imposed for the protection of fisheries, (Manchester v. Massachusetts, supra; Smith v. State of Maryland, 18 How. 71;) ninth, quarantine laws, (Morgan's L. & T. R. & S. S. Co. v. Louisiana Board of Health, 118 U. S. 455, 6 Sup. Ct. Rep. 1114;) tenth, regulating the charges of floating elevators, (Budd v. New York, 143 U. S. 517, 12 Sup. Ct. Rep. 468;) eleventh, establishing and regulating ferries, (Gibbons v. Ogden, 9 Wheat. 1, 203); Conway v. Taylor, 1 Black, 603; Wiggins Ferry Co. v. City of East St. Louis, 107 U. S. 365, 2 Sup. Ct. Rep. 257; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 204, 214-217, 5 Sup. Ct. Rep. 826.)

Besides these new rights created, of so diverse a character, there are many other local regulations established under state authority, concerning the navigation of rivers and harbors, anchorage grounds, port wardens, navigation about piers and slips, and wharf and ferry privileges, which give birth to many specific rights that are constantly recognized and enforced in the trial of admiralty causes. These acts rest either upon the police power of the states, or on the local nature of the subject, and the absence of any legislation by Congress on the same matter. Gloucester Ferry Co. v. Pennsylvania, ut supra. They show that over quite a wide range of local interests, state legislation is competent to deal with purely maritime subjects, and to create rights and duties which must be recognized in admiralty causes, though they may not change any of the characteristic principles of the maritime law."

The Lottawanna, 21 Wall. 558, 575:

"One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with and operating uniformly in the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states."

Butler v. Boston S. S. Co., 130 U. S., 527, 557:

"The present case, therefore, is clearly within the admiralty and maritime jurisdiction. The stranding of the City of Columbus took place on Devil's Bridge, on the north side of and near Gay Head, at the west end of Martha's Vineyard, just where Vineyard
337 Sound opens into the main sea. Though within a few rods of the island (which is a county of Massachusetts) and within the jaws of the headland, it was on the navigable waters of the United States, and no state legislation can prevent the full operation of the maritime law on those waters.

It is unnecessary to consider the force and effect of the statute of Massachusetts over the place in question. Whatever force it may have in creating liabilities for acts done there, it cannot neutralize or affect the admiralty or maritime jurisdiction or the operation of the maritime law in maritime cases. Those are matters of national interest. If the territory of the state technically extends a marine league beyond the seashore, that circumstance cannot circumscribe or abridge the law of the sea. Not only is that law the common right of the people of the United States, but the national legislature has regulated the subject in greater or less degree, by the passage of the navigation laws, the steamboat inspection laws, the limited liability act and other laws. We have no hesitation, therefore, in saying that the limited liability act applies to the present case, notwithstanding the disaster happened within the technical limits of a county of Massachusetts, and notwithstanding the liability itself may have arisen from a state law. It might be a much more serious question, whether a state law can have force to create a liability in a maritime case at all, within the dominion of the admiralty and maritime jurisdiction, where neither the general maritime law nor an act of Congress has created such a liability. On this subject we prefer not to express an opinion."

Workman v. City of New York, 179 U. S., 552.

The facts in this case were that a fire tug, belonging to the City of New York, as it was running to a fire negligently collided with a vessel, doing considerable damage. Under the New York statutes there could be no liability of a department of the city for negligence in performing a governmental function and the question was squarely passed on by the United States Court as to whether the New York statute or the national maritime law should govern. At page 557 the court uses the following language:

"We come then to consider first whether in the decision of the controversy the local law of the City of New York or the maritime law should control".

In deciding this question the court say, at page 55:

338 "The practical destruction of a uniform maritime law which must arise from this premise, is made manifest when it is considered that if it be true that the principles of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts, can be

overthrown by conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one State and one in another; one thing in one port of the United States and a different thing in some other port. As the power to change state laws or state decisions rests with the state authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing today and another thing tomorrow. That the confusion to result would amount to the abrogation of a uniform maritime law is at once patent. And the principle by which the maritime law would be thus in part practically destroyed would besides apply to other subjects specially confided by the Constitution to the Federal government. Thus, if the local law may control the maritime law, it must also govern in the decision of cases arising under the patent, copyright and commerce clauses of the Constitution. It would result that a municipal corporation, in the exercise of administrative powers which the state law determines to be governmental, could with impunity violate the patent and copyright laws of the United States or the regulations enacted by Congress under the commerce clause of the Constitution, such as those concerning the enrollment and licensing of vessels. This follows if a corporation must for a wrong by it done, be allowed to escape all reparation upon the theory that, though ordinarily liable to sue and be sued, it possessed in the particular matter the freedom from suit which attaches to a sovereign State.

The disappearance of all symmetry in the maritime law and the law on the other subjects referred to, which would thus arise, would, however, not be the only evil springing from the application of the principle relied on, since the maritime law which would survive would have imbedded in it a denial of justice."

The Henry B. Smith, 195 Fed., 312.

In this case the issue was between an act similar to the one at bar and the national maritime law. The syllabus is as follows:

"A right of action for the recovery of damages for personal injuries not resulting in death, arising out of a maritime tort, depends upon the maritime law, which cannot be enlarged by a state statute to give a right of action in rem".

The court in its opinion said:

339 "The maritime law, which the libelant invokes, cannot be altered, modified, or changed by state enactment. The right of action arising out of maritime tort, relating to the recovery of damages for personal injuries, depends upon the maritime law, which has been adopted by the laws and usages of the country. The Lottawanna, 21 Wall., 588, 22 L. Ed. 654. There is, moreover, no maritime lien by the statutes of this state to support this proceeding in rem, and I am constrained to hold that in an action for personal injuries the Employers' Liability Act of the state has no application. Rights of action in admiralty are sui generis, and controlled by the

maritime law, save in case of death, wherein the states, by legislative enactments, have created liens and rights of action which are not inconsistent with the maritime law."

The Fred E. Sander, 208 Fed., 724.

"The Workmen's Compensation Act (Laws Wash. 1911, c. 74) which abolishes civil actions for the recovery of damages by workmen for personal injuries received on account of negligence of employers, does not withdraw from a workman injured while employed on a vessel his remedy by proceeding in rem in admiralty against the vessel to enforce the lien given by the maritime law for his injury."

It probably will also be conceded that if the action were brought in the United States District Court on the law side, that the state statute could not apply.

Murray v. The Chicago Ry. Co., 62 Fed., 24, Supra.
Horn v. The George H. Hammond, 71 Fed., 314, 316.

"These duties and responsibilities undoubtedly involve mixed questions of law and fact; but with reference to the ordinary class of cases, of which this is clearly one, the questions both of law and fact have come so often before the courts that they have settled into a well known practical rule which the courts will not allow juries to disregard".

The court in using the above language was referring to an open hatchway on a ship.

Cornell Steamship Co. v. Fallom, 179 Fed., 293, 294.

The court in speaking of the relationship of ship and seamen said: "The contract between the defendant and the deceased is a maritime contract and establishes their relation as well in courts of law as in courts of admiralty".

Schuede v. The Zenith S. S. Co., Supra.

340 "This action was begun at law in the state court and was removed to this court because of diversity of citizenship. The proposition before the court requires the same determination as if the case were still in the state court."

The court then proceeds to discuss and dispose of the matter under the maritime law, although the case was on the law side of the federal court.

If the act could not apply in the United States Court on the admiralty side nor in the United States court on the law side, should it be permitted to apply to the very same set of facts in the state court? Can the mere choice of forum change fundamental rights? If so, just pause for a moment and contemplate the confusion which would result. A boat may be owned in Wisconsin and in her regular voyages on the Great Lakes may go into and remain in other states just as much as in Wisconsin. She would have to comply with the statutes of all the states she went into. Indeed, in almost any voyage on the Great Lakes the ships have to go into the jurisdiction of sev-

eral states and almost invariably that of Canada, and even if a voyage could be planned so as to avoid some of these jurisdictions by running in a round-about way, boats are liable by stress of weather or other emergencies to have to go into any jurisdiction bordering on or extending over the Great Lakes. The result would be that every ship owner at his peril would have to comply with every employer's liability and workmen's compensation act of every jurisdiction on the Great Lakes, of which there are nine. These jurisdictions may have no such statutes, or there may be as many different statutes as there are different jurisdictions. A ship owner would not only be under the expense of complying with all these various statutes, but his liability would be one thing today and another thing
341 tomorrow, and so on through the various jurisdictions into which the ship may go in the course of her voyage, and even if he complied with all the acts of all the various states, the seaman could prevent him getting any benefit therefrom by bringing his suit in admiralty.

It may be claimed that a ship carries the state territoriality of her owner with her for the purposes of these particular statutes, but several people often own undivided interests in the same ship, and suppose such owners live in different states. In fact it might very well happen that a ship might be owned by eight different owners residing one in each of the eight states bordering the Great Lakes. Which territoriality would she carry? Also, a ship does not have to be owned by a resident or citizen of a lake state. There might be a part owner in any number of different states or in all the states of the union, some of which are entirely interior and border on no navigable water. Which act would control? If it is claimed that the residence or citizenship of the principal owner or managing owner would control, such principal or managing owner might be a citizen of some interior state not touching any navigable water and into which the ship herself could never come. In fact, if the doctrine of territoriality is allowed to prevail, we would expect to see all ships owned in a very short time by a citizen of some jurisdiction where there were no employer's liability or workmen's compensation acts. Furthermore, a ship is a distinct entity by itself, separate or distinct from its owner or owners, and is enrolled or licensed under the national government and not by the state where any owner happens to reside.

On the other hand, if we turn to the seaman and consider his rights, we have confusion worse confounded. Seamen are
342 proverbially peripatetic. They are on one ship today and another tomorrow. If each particular statute has to be complied with, his rights are one thing one minute and another thing the next minute, as his ship crosses a jurisdictional line, or if his six hundred foot ship lies across such a line, it might be one thing in one end of his ship and another thing in the other end of his ship for the very same character of injury under the very same circumstances on the very same ship. Or if the doctrine of state territoriality of the owner is to apply, he might be on one ship in the forenoon and on another in the afternoon in the very

same harbor or lying at the very same dock and his rights would be one thing in the forenoon and another in the afternoon. Or suppose 9, 19 or 29 of our modern lake steamers, with managing owners who were citizens of as many different states, to be lying at the same dock and a seaman is injured under the same circumstances, such as falling into the hold, on each of these ships. Each one of these 9, 19 or 29 seamen would have different rights, although all were serving under similar maritime contracts, signing identical shipping articles, covering the same waters, on ships enrolled and licensed by the United States for exactly similar service and navigating the same public navigable waters of the United States.

These absurdities were recognized by Judge Killits in Schuede v. Zenith S. S. Co., supra.

"First, the defendant, for torts on contract committed by it of precisely the same character and upon servants of precisely the same class, would be subject to as many vari-ties of responsibility and would be compelled to vary its defenses as the laws pertaining to the incidents of service differ in the several places of accident. There are seven state jurisdictions bordering upon the waters in which the Saxona plies and it is conceivable that seven seamen of the same class, each might meet in his employment with an injury
343 substantially of the same class in a port of each of such jurisdictions, each claimant enjoying a common right of recovery under the maritime law, or a different right under the local law. Second, a seaman would enjoy the option of a uniform contractual right under the law maritime or to vary under local laws the incidents of the contract as he proceeds from port to port and as he had occasion to invoke such rights. In Buffalo his contract would be one thing; in Cleveland, if the Ohio law differs from that of New York, it would have another phase; to change its color again in Detroit, Milwaukee, Duluth, Chicago, and Michigan City, if the laws of their several jurisdictions, respectively, offer peculiarities."

We submit, therefore, that the act should not be applied to the relationship of ship and crew merely because the action happens to be brought in a state court. We thus avoid the foregoing absurdities, as well as the absurdity of having one set of rights and liabilities in one court and an entirely different set of rights and liabilities arising out of the same relation between the same parties for the same acts if brought in another court.

That the national maritime law should govern in state courts, has been repeatedly held.

Scarff v. Metcalf, 107 N. Y., 211.
Gabrielson v. Waydell, 135 N. Y., 1.

"I concede fully that we should in determining this question be guided by the principles of the maritime law. The plaintiff's employment was, of course, a maritime contract. * * * We are then brought to the consideration of the rule of liability which would be applied to this case under the law as settled by this court,

and there we will find the rule is not respondeat superior. We find that for an injury resulting to an employe from the willful neglect or tortious act of another who is engaged in a common employment with him, the master is not liable at the suit of the injured employe. He has performed his duty when he has furnished to those who are employed by him a reasonably safe place, appliances adequate to the purposes of the employment, and when he has appointed as fellow servants in the undertaking proper persons competent for their positions. After that, for what may happen from the risks of the employment or from the negligence and torts of fellow servants, he will not be responsible.

In Bach v. Western Transit Co., an action for personal injuries in the Supreme Court of New York by a fireman on a steamer, the court held that the general maritime law should control as against the employers' liability act of the State of New York.

344 The language of the court, as contained in the record, which will be presented to the court, pages 103 et seq., is as follows:

"It is my judgment, of course, that this case comes under the maritime law. The state court, of course, has cognizance of the case, but the maritime law is what controls, as I take it. * * * That is not really the duty of the owner. The owner turns over to the crew a perfect working machine. The responsibility is not upon the owner of the ship after that. The men who operate it are supposed to look after it because the owner cannot be there. The boat leaves port and is gone for two weeks. If the owner were chargeable with everything that happens, you can see that the responsibility would be beyond anything * * * I think I shall make the determination on the ground that the case is in maritime law. That is the law that controls this case. Your position is that the employers' liability act of the State of New York applies, and upon that I rule that it does not; that it is the maritime law that controls."

In the case of Carberry v. The Acme Transit Co., which was started in the State court and removed to the Federal court on the law side, so that the position is practically the same as if completely tried out in the State court, the court charged the jury as follows:

"Now gentlemen, if the plaintiff had been employed by the defendant as a seaman to perform the duties of a seaman aboard that vessel, it is very doubtful—indeed, I am quite certain, that this action could not have been maintained. The rule of law applicable to seamen engaged in the navigation of a vessel is quite different from the rule of law which I shall declare in this case; if, under the circumstances of this occurrence, this accident had happened while the ship was at sea or had it happened to the seaman, there could have been no recovery by the person injured, other than for the care and attendance."

345 In Knapp v. United States Transportation Co., another action for personal injuries in the Supreme Court of New York, the same holding was made.

Erie Railroad Co: v. Welsh, 89 O. S., 54:

This case had no admiralty phase, but the principle contended for here was clearly announced, namely, that if there is a national law upon the subject the national law must govern the rights and liabilities of the parties to the exclusion of a state statute, although the action may be brought in the state court. The analogy between the case of the Erie Railroad vs. Welsh and the present case was noted by Judge Killits in Schuede v. Zenith Steamship Company, Supra, as follows:

"It seems reasonable to urge an analogy between the law maritime respecting the incidents of a seaman's employment as of general and exclusive application when it comes to a determination of the employer's responsibility for an injury in line of duty, and the federal law relating to the liability of carriers by railroad to their employes (Act of 1908). Before the act was passed, an action by an injured employe was governed by the law of the jurisdiction in which the cause thereof arose. Congress had not legislated upon a subject within its power; hence the states were privileged to apply their own laws. Now the federal law fixing the limits and controlling the rights and liabilities of the parties must be applied to the exclusion of the local law, although a state forum may be entered for a remedy."

Following this line of reasoning, the court squarely held that the action would have to be decided the same as if in the state court, and held that the maritime law should govern, regardless of the choice of forum.

"The proposition before the court requires the same determination as if the case were still in the state court. * * * In the case of a cause of action for an injury incurred in the course of a maritime employment, to avoid the manifest inconvenience and inequalities involved in plaintiff's interpretation of the saving clause in question (Sections 24 and 256 of Judicial Code), it is not only reasonable but well within the language of the law to require whichever court, state or federal, is entered to work out a remedy, to enforce the general and uniform law maritime under which the contract of employment was made."

346 The acts of commission or omission on the part of a ship owner which constitute negligence for which an action by a seaman would lie ought not to vary according to the choice of forum, and neither should the rights of an injured seaman be subject to change by removal to a federal court or the filing of limitation of liability proceedings under United States statutes 4282 to 4286, which bring all cases at law in the state courts or otherwise into the federal court in admiralty. These duties owing by ships to seamen are constant and a breach thereof ought to have the same result, regardless of the vissicitudes of ability to get service or ability of the defendant to remove from a state to a federal court. These are rights and liabilities which have always been fixed by national policy, are now determined by national policy and it would be contrary to this national policy to permit a state to change these well-estab-

lished principles and instead of having a national policy on a national subject, to have these well-known rights and liabilities changed with every jurisdiction into which a ship may go.

On both principle and authority, therefore, we submit that a state cannot pass an act contrary to the established national maritime law and that such law should govern, whether the action be brought in the admiralty court, the law side of the federal court or the state court, the policy of our country having been to leave maritime matters to the national government because of their national character. A state should no more be permitted to control maritime matters than it should control patent matters, copyright matters or interstate commerce matters.

To sum up, we have a national maritime law which has all the force and effect of United States statutes and which applies universally throughout the country; this national maritime law
347 governs the rights, duties and liabilities as between ship and crew engaged in interstate commerce on all public navigable waters of the United States, even though such waters may be wholly within a state, and such state cannot pass and enforce an act in derogation thereof.

As against this there will no doubt be three points urged in argument:

1. That in the admiralty grant to the federal government by the Constitution there is a saving to suitors "in all cases the right of a common law remedy where the common law is competent to give it."

2. That the states can pass and enforce an act which may in some respects entrench upon national jurisdiction, so long as Congress has not acted.

3. That each state can pass its own death act, which will apply in admiralty, and by analogy they ought to be allowed to pass employers' liability or workmen's compensation acts and make them equally applicable.

As to the clause saving to suitors a common law remedy, we contend that this refers to the remedy only and means that a suitor may select a common law tribunal to pursue his remedy, but that such common law tribunal, while proceeding in accordance with its own machinery, must take his rights and liabilities as it finds them by virtue of his contract, which must be the same, no matter what tribunal is passing upon them. In this connection we quote the language of Judge Killits in Schuede v. The Zenith S. S. Co., Supra:

"Involved in the questions of construction are the provisions of paragraphs 3, respectively, of Sections 24 and 256 of the Judicial Code of the United States (Act of March 3, 1911, Sec. 711, R. S. U. S.), for a saving to suitors against the exclusive jurisdiction of admiralty 'in all cases the right of a common law remedy, where the common law is competent to give it.'

348 It is clear that plaintiff could have proceeded in admiralty for an injury arising in the course of such employment either in rem or in personam, in which case his rights would be determinable only by the principles of the maritime law, and it seems,

therefore, to be the contention of his counsel that, because of the language quoted above from the judicial code, he has the option of entering the state court and at law there work out his rights by the law of the forum, enjoying whatever advantages he believes the state law offers to one complaining of injuries received in his master's service.

It must be conceded that the plaintiff's employment was under a maritime contract. Gabrielson vs. Waydell, 135 N. Y., 1, 31 N. E., 969; Cornell Steamboat Company vs. Fallon, 179 Fed., 293). Both the general admiralty law and its statutory modifications treat and have always treated those engaged as seamen with particular favor, and the law in admiralty defines with particularity the reciprocal duties and responsibilities of owner and crew, master and seaman. (The Osceola, 189 U. S., 158.)

We agree with counsel for defendant that the principles of the general maritime law in force in the United States and not the subject of specific enactment by Congress are to be treated as if actually on the statute books. This must be construed to be the effect of Sec. 2, Article III, of the Constitution, extending the power of the federal courts 'to all cases of admiralty and maritime jurisdiction,' thus practically adopting the general law of admiralty as the law of this country, and such general law in force when the constitution was adopted and not modified by act of Congress has the same force and is to be treated with the same consideration as must be given to statutes upon the subject. (Murray vs. Chicago & Northwestern Railroad Co., 62 Fed., 24; The Lottawanna, 21 Wallace, 558.)

A state may not pass any act which abridges or enlarges the responsibilities or duties of maritime law; rights in admiralty cannot be affected by state enactment. (The Moses Taylor, 4 Wallace, 411; The Hine vs. Trevor, 4 Wallace, 555; The Lottawanna, supra; Butler vs. Boston Steamship Co., 130 U. S., 527; Workman vs. New York, 179 U. S., 552.)

But for the exception in the act of 1789 (Sec. 711, R. S.), carried into the present Judicial Code, allowing suitors recourse to a competent common law remedy where one exists, it would seem that the citations above, by no means exhaustive, asserting the controlling force of general and statutory maritime law, would indicate the necessity to overrule the motion before the court. To advance that saving clause as a reason why the plaintiff may escape what he may assume to be the disadvantages incident to his maritime contract and seek the advantages of the state law in his suit in a state court upon such a contract is, in our judgment, to misapprehend what is meant in this provision by the word 'remedy.'

It must be observed, as suggested by Justice Field, in the Moses Taylor, supra, quoted approvingly in The Glide, 167 U. S. 606, 617, that what is saved to a suitor 'is not a remedy in the common law courts, but a common law remedy'; that is, as we paraphrase it, the suitor who has a right of action growing out of a maritime contract may not go into a law court to find a new remedy, but he may employ a common law forum, if one is found competent to work out the rights involved in his contract.

In the case before us, the maritime law is not so favorable to the plaintiff touching the range of defense to his action as would
349 be the Ohio law, but those defenses which he seeks to avoid are incidents to and, as against him, liabilities of his contract; they help define his contract of employment, and hence, although employable against him in defense, are no part of the remedy, as that term is used in the saving clause of the code. The clause 'leaves open the common law jurisdiction of the state courts over torts committed at sea,' (The Hamilton, 207 U. S., 398-404), and, in our judgment, does nothing else. The extent of liability for such a tort to be enforced in a common law jurisdiction is to be restrained by the law which created the relation in which it was committed. This is the position taken by the court in Gabrielson vs. Waydell, supra. It is precisely the distinction drawn in cases dealing with conflicts between the lex loci contractus and the lex fori, well illustrated in the case of Heaton vs. Eldridge, 56 O. S. 87, enforcing the principle that 'Contracts receive their sanction from the law of the place where they are executed and to be performed, and their interpretation is controlled by that law; but the remedy upon the contract will be administered according to the law of the place where the remedy is sought.' The Supreme Court of Ohio held that the statute of frauds may, in an action in this state, be pleaded against the enforcement of a contract made in Pennsylvania, where no such statute was in force against the contract, because the defense did not affect the obligations under the contract but their enforcement only. In Davis vs. Morton, 5 Bush. 160, A. D. 345, set-off against the payee was allowed against the remote endorsees of a note made in Tennessee but sued on in Kentucky, because the Kentucky law of set-off, in the court's judgment, belonged rather to the remedy than to the substance. In Downer vs. Chesbrough, 36 Conn. 39, it was held that the lex fori controlled the remedy upon a contract, but the lex loci contractus governed its obligations.

As we look at it, the provisions of the law maritime as to the relation of a seaman to his employment are part of the substances and obligations thereof, which cannot be modified by state law, even through recourse to the saving clause of the code. The exact question before the court has apparently never been specifically passed upon by a court of higher jurisdiction than ours, so far as we know, but so far as the force of the expression of the Judicial Code granting this saving to suitors has been discussed at all by the Supreme Court of the United States, it has been consistent entirely with the position which we — taken, as is seen by citation above from the Hamilton and the Moses Taylor. An earlier case is that of Steamboat Company vs. Chase, 16 Wall. 552, in which it was urged that the saving of a right to enter the state courts was not applicable to a case where the right of action which might have been enforced in admiralty was not created by a state statute enacted subsequent to the passage of the judiciary act. The court says (page 534):

'Questions of the kind (such as we have before us here) cannot arise in suits in rem to enforce maritime liens, as the common law is not competent to give such a remedy, and the jurisdiction of the

admiralty courts in such cases is exclusive. Such a question can only arise in personal suits where the remedy, in the two
350 jurisdictions, is without any substantial difference. Examined carefully it is evident that Congress intended by that provision to allow the party to seek redress in the admiralty in he saw fit to do so, but not to make it compulsory in any case where the common law is competent to give him a remedy. Properly construed, a party under that provision may proceed in rem in the admiralty, if a maritime lien arises, or he may bring a suit in personam in the same jurisdiction, or he may elect not to go into admiralty at all, and may resort to his common law remedy in the state courts, or in the Circuit Courts of the United States if he can make proper parties to give the Circuit Court jurisdiction of his case.'

In The Belfast, 7 Wallace, 624, 644, Justice Clifford uses this language:

'Undoubtedly, most common law remedies, in cases of contract or tort, as given in common law courts, and suits in personam, in the admiralty courts, bear strong resemblance to each other, and is not, perhaps, inaccurate to regard the two jurisdictions as concurrent.'

Again, the same Justice, in Steamboat vs. Chase, in the opinion from which we have just quoted, calling attention to the fact that 'different systems of pleading and modes of proceeding and different rules of evidence prevail in the two jurisdictions,' says that the 'State legislatures may relegate the practice, proceedings and rules of evidence in their own courts,' which, when the action is at law in a federal court, shall, as far as applicable, become rules of decision.

It seems impossible to resist the conclusion that these Justices are conceding nothing more than the right of a suitor to enter a state court at law to have there his demands heard and determined according to the practice, procedure and rules of evidence in that jurisdiction, and for no other purpose, and that they do not construe the provision as giving the suitor, with that option, an enjoyment of a change in the character and measure of his demands, and of the responsibilities and defenses of his master, under the contract underlying the action, a change due to the fact that between admiralty and at law in the state jurisdiction there is a diversity of incidents attaching to employment. Otherwise, Justice Clifford could not have said, accurately, that the remedies in the two courts are, without any substantial difference,' or that they have such a 'strong resemblance to each other' that they may fairly be regarded 'as concurrent,' nor would Justice Field have distinguished between 'a remedy in the common law' and 'a common law remedy.' "

As to the argument that a state can pass and enforce an act where Congress has not acted, we submit that this is so only where their jurisdiction is concurrent, and not where the exclusive jurisdiction has been vested in the national government, as it has been by the United States Constitution in this maritime matter. Also, we contend that there is a national maritime law on the subject
351 which has all the force and effect of a specific act of Congress and the situation is just the same as if Congress had passed a specific act in reference thereto. Further, in this connection we

contend that a state cannot pass and enforce an act contrary to the well-known and long-established policy of the national government on a subject in its nature essentially national. These matters have already been argued previously in our brief and authorities cited.

As to the argument that by analogy to the state death statutes the states have authority to pass and enforce employers' liability and workmen's compensation acts which would apply as between ship and seamen contrary to the national maritime law, we contend that there is no analogy because the state death statutes are not contrary to the general maritime law or any act of Congress.

The general maritime law was just like the common law in this respect. There never was from the beginning of time any right of action for death by wrongful act.

Steamboat Co. v. Chase, 16 Wall., 522.
The Harrisburg, 119 U. S., 199.

This was the condition of the general maritime law at the time it became the national maritime law of our country, and so it has remained ever since. Nor has Congress ever passed any act giving a right of action for death by wrongful act. As there is no national maritime law upon the subject and as there is no act of Congress upon the subject, the state death statutes are not enforced contrary to the national law, but for the very opposite reason that there is no national law upon the subject.

Sherlock v. Alling, 93 U. S., 99.
The Hamilton, 207 U. S., 398.

It will have to be conceded that if Congress had legislated
352 on the subject the state acts providing for death by wrongful act could have no application to a seamen meeting his death upon a ship engaged in interstate commerce, and we contend that it would be equally true that if our national maritime law had established any such rights or liabilities for death, the states could not pass acts which would abolish, change or add to these rights and liabilities. Congress not having legislated or there being no national maritime law upon the subject, the state statutes cannot be in conflict with something which does not exist. There is no analogy, therefore, as to the case at bar and death cases, because here we have the rights and liabilities of the parties well established by the national maritime law and as the state statute is in conflict therewith, it cannot apply to the ship and crew engaged in interstate commerce upon the public navigable waters of the United States.

Schuede v. The Zenith S. S. Co., Supra.

"We are not in conflict with the long line of cases cited and examined, dealing with deaths resulting from maritime torts, and in which state laws are applied in proceedings in admiralty, as well as in actions at law in state and federal courts. It is worthy of note that in all these cases, from one of the earliest (Steamboat Company vs. Chase, supra), to the latest (The Hamilton, supra, and Thompson, etc., vs. MacGregor, supra), the application of state laws is sustained,

not because such laws can be utilized in all cases when a suitor prefers to enter a state court, but because 'where no remedy exists for an injury in the admiralty courts, the fact that such courts exist and exercise jurisdiction in other causes of action leaves the state courts as free to exercise jurisdiction in respect to an injury not cognizable in the admiralty as if the admiralty courts were unknown to the constitution and had not existence in our jurisprudence.' (Steamboat Company vs. Chase, supra.) In admiralty no remedy exists for a death resulting from a maritime tort. In Cornell Steamboat Company vs. Fallon, 179 Fed., 293, Circuit Court of Appeals, Second Circuit, a death case, action at law under the New York modification of Lord Campbell's Act it was pointed out that decedent, a seaman injured in the service of his vessel, had he lived to sue either at law or in admiralty, would have had his rights determined by the law maritime affecting his contract of employment, whereas his administratrix was privileged to use the state law."

353 For another and entirely different reason, this statute of the State of Ohio cannot be applied in this case. The statute providing for the state insurance fund is to all intents and purposes the levying of a tax. A tax is defined to be

"The terms tax and taxes have been defined as a rate or sum of money assessed on the person or property of a citizen by government for the use of the nation or state; the burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes and the enforced proportional contribution of persons and property levied by authority of the state for the support of the government and for all public needs."

37 Cyc., 706.

In accordance with this definition, the establishment of the state insurance fund and the raising of money as there provided is a levy of a tax, and in the case of State ex rel. Yapel v. Cremer, 85 O. S., 349, where the question of the constitutionality of this measure was at issue, it was assumed by the attorneys for the State in their brief, page 369, that this contribution to the State insurance fund was a tax and their justification thereof was entirely from that point of view and the tenor of Judge Johnson's remarks at page 398 and following would seem to indicate that he made the same assumption. Practically the same question was involved in the teachers' pension fund cases.

"Such act (a teacher's pension fund for Toledo) in providing that one per cent. of the salary paid to teachers shall be deducted therefrom and applied to create a school teachers' pension fund also violates Section 2 Article 12 of the Constitution of Ohio providing for a uniform taxation of property." * * * "A majority of the court are also of the opinion that the law is unconstitutional upon another ground, in that it violates the provision of the constitution as to taxation and permits and requires the taking of private property without due process of law." * * * "Money taken from the teachers by virtue of this statute is either taxation for public good or it is the taking of money from one person for the benefit of another

contrary to the will of such person from whom it is taken and without his consent. The provision of the constitution as to taxation is found in Section 2, Article 12 'Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks,
354 joint stock companies, or otherwise,' etc. Now if pension legislation is for the benefit of the public, for the public good, then money raised for such purposes can only be regarded as taxes, and this money deducted from the teachers' salaries is a tax."

State ex Rel. Ward v. Hubbard, 22 C. C. 253; affirmed without report 65 O. S., 574.

There can be no question but that this ship and those employed on her were engaged in interstate commerce.

"A dining car regularly engaged in interstate commerce does not cease to be so when waiting for the train to make the next trip. * * * Counsel urges that the character of the dining car at the time and place of the injury was local only and could not be changed until the car was actually engaged in interstate movement or being put into a train for such use, and Coe v. Errol 116 U. S. 517, is cited as supporting that intention. In Coe v. Errol it was held that certain logs cut in New Hampshire, and hauled to a river in order that they might be transported to Maine, were subject to taxation in the former state before transportation had begun.

The distinction between merchandise which may become an article of interstate commerce or may not, and an instrument regularly used in moving interstate commerce, which has stopped temporarily in making its trip between two points in different states, renders this and like cases inapplicable.

Confessedly this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic and so within the law."

Johnson v. Southern Pacific Co., 196 U. S., 1, 22.

"One carrying materials to be used in repairing an instrumentality of interstate commerce is engaged in such commerce, and so held, that a railroad employe carrying bolts to be used in repairing an interstate railroad and who was injured by an interstate train is entitled to sue under the Employers' Liabilit- Act of 1908. * * * The point is made that the plaintiff was not at the time of his injury engaged in removing the old girder and inserting a new one, but was merely carrying to the place where that work was to be done some of the materials to be used therein. We think there is no merit in this. It was necessary to the repa- of the bridge that the materials be at hand, and the act of taking them there was a part of the work. In other words, it was a minor task which was essentially a part of the larger one, as in the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce."

Pedersen v. Del. Lock. & West. R. R. Co., 229 U. S., 146, 152.

355 "An employe whose duty is to take the numbers of, and seal up and label, cars, some of which are engaged in interstate and some in intrastate traffic, is directly and not indirectly engaged in interstate commerce."

St. L. & San. Fran. Ry. v. Seale, 229 U. S., 156.

"A locomotive fireman in the employment of a railroad company engaged in interstate commerce, who was ordered by his superiors to report at a station to be transported with others to another station to relieve the crew of an interstate train, and who, when approaching the station over a crossing, was struck and killed through the negligence of other servants of the company, also operating an interstate train, was employed in interstate commerce at the time of his death within the meaning of the Employers' Liability Act."

Lamphere v. Oregon R. & Nav. Co., 196 Fed., 336.

"Acts of an employe in preparing an engine for a trip to move freight in interstate commerce, though done prior to the actual coupling up of the interstate cars, are acts done while engaged in interstate commerce."

North Carolina R. R. Co. v. Jacbary, 232 U. S., 248.

"A boiler maker's helper employed in the shops of a railroad company, injured while assisting in the repair of an engine regularly in use in interstate commerce but temporarily in the shop for repairs, where it had been for 21 days, and which was returned to use two days later, was 'employed in interstate commerce' at the time of his injury within the meaning of the Employers' Liability act."

Law v. Ill. Central R. Co., 208 Fed., 869.

"A sleeping car bound through from Columbus, Ohio, to Washington, D. C., with passengers, is engaged in interstate commerce even while waiting at a junction point to be attached to a through train."

Pullman Co. v. Linke, 203 Fed., 1017.

We have found that the Ohio act is the levying of a tax and that this ship and crew were engaged in interstate commerce, and it follows that the act cannot apply to a ship and seamen, because a state cannot tax interstate commerce. That over which the sovereignty does not extend is not subject to taxation thereby.

McCullough v. Maryland, 4 Wheat., 316.
Cook v. Pennsylvania, 97 U. S., 566.
Gloucester Ferry Co. v. Pennsylvania, 114 U. S., 196.
Van Brochlan v. Anderson, 117 U. S., 151.
Robbins v. Shelby County Taxing District, 120 U. S., 489.

356 "Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce."

If Congress had passed a workmen's compensation act, it could and would raise its money for the purpose of making payments by a tax on these same boats or owners thereof as engaged in interstate com-

merce. If the federal government could only raise its funds on this basis, by the very same token the states could not do so.

A state cannot tax vessels as instruments of commerce.

Hays v. Pacific Mail S. S. Co., 17 How., 596.

Wheeling Transportation Co. v. Wheeling, 99 U. S., 273.

"The power to regulate commerce includes the power to regulate navigation as connected with commerce in foreign nations and among the states; it does not stop at the mere boundary line of a state, nor is it confined to acts done on the waters or in the necessary course of the navigation thereof; it extends to such acts done on land which interfere with, obstruct or prevent the due exercise of the power to regulate commerce and navigation with foreign nations and among the states."

U. S. v. Coombs, 12 Peters, 72.

We therefore submit that for this additional reason the Ohio act creating an insurance fund cannot apply to ships engaged in interstate commerce, as it would be in contravention of the commerce clause of the constitution.

Plaintiffs were not without experience. They had worked about hatches.

Wattawa said he was twenty-three years of age, and lived in Manitowoc, Wisconsin; that in 1910 he made a trip on the "John P. Reiss" from Green Bay, Wisconsin to Duluth, from Duluth to Ashtabula and from Ashtabula to Escanaba (47). This was a trip of two weeks.

357 STATE OF OHIO,
Cuyahoga County, ss:

In the Court of Appeals, Eighth District, October Term, 1914.

No. 597.

VALLEY STEAMSHIP COMPANY, Plaintiff in Error,
vs.
JOHN J. WATTAWA, Defendant in Error.

No. 624.

VALLEY STEAMSHIP COMPANY, Plaintiff in Error,
vs.
JOSEPH MRAZ, Defendant in Error.

Error to the Court of Common Pleas.

Opinion, Rendered Dec. 24, 1914.

Winch, Meals, and Grant, JJ. (Meals, J., and Grant, J., concur).

WINCH, *J.:*

It has many times been decided by the Supreme Court of this state, by the federal courts and by this court that a state statute regu-

lating the relative rights and duties of persons within the state, and providing for their safety, will be enforced by both the state and federal courts, in cases of which they have jurisdiction. Such state statutes, though they affect persons engaged in interstate commerce, are inapplicable only when they conflict with federal statutes
358 upon the same subject.

Railway Co. v. State, 82 O. S., 60;
Trauffler v. D. & C. Navigation Co., 181 Fed., 256.
Erie Railroad Co. v. State of Ohio, #10 Court of Appeals of Cuyohaga County, decided Feb. 17, 1913.

The trial court, therefore, very properly gave in charge to the jury the rules provided by the Workmen's Compensation Act of this state, as applicable to the facts before it. This is true as to both cases here under review, which grew out of the same accident.

In neither record do we find any error prejudicial to the rights of plaintiff.

In each case the judgment is affirmed.

Messrs. Holding, Masten, Duncan & Leckie, Counsel for Plaintiff in Error.

Messrs. Reid, Eichelberger & Nord and F. M. Cobb, Counsel for Defendant in Error.

359 THE STATE OF OHIO,
Cuyahoga County, ss:

I, Edmund B. Haserodt, Clerk of the Court of Appeals within and for said County, and in whose custody the files, Journals and Records of said Court are required by the laws of the State of Ohio, to be kept, hereby certify that the foregoing is taken and copied from the Opinion of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that said foregoing copy has been compared by me with the original entry on said Opinion and that the same is a correct transcript thereof.

In Testimony Whereof, I do hereto subscribe my name officially, and affix the seal of said Court, at the Court House, in the City of Cleveland, in said County, this 14th day of April A. D. 1916.

[Seal Court of Appeals, Cuyahoga County, Ohio.]

EDMUND B. HASERODT, *Clerk,*
By H. A. GALE, *Deputy Clerk.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 4-14-'16. H. A. G.]

360 THE STATE OF OHIO,
Cuyahoga County, ss:

In the Court of Appeals of Cuyahoga County, —— Term, 191–.

Counsel for plaintiff in error shall, within fifteen days after filing petition in error, or bill of exceptions, as provided by Gen. Code

11572, file with the clerk three printed or typewritten copies of a brief containing a statement of the questions presented and a succinct statement of so much of the cause, referring to the pages of the record, as is necessary to show how the questions arise, together with a statement of the authorities relied upon.

From Court of Appeals Rule VIII.

361 THE STATE OF OHIO,
Cuyahoga County, ss:

I, Edmund B. Haserodt, Clerk of the Court of Appeals within and for said County, and in whose custody the files, Journals and Records of said Court are required by the laws of the State of Ohio, to be kept, hereby certify that the foregoing is taken and copied from Rule VIII on Briefs in Court of Appeals of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that said foregoing copy has been compared by me with the original entry on said Rule VIII on Briefs and that the same is a correct transcript thereof.

In Testimony Whereof, I do hereto subscribe my name officially, and affix the seal of said Court, at the Court House, in the City of Cleveland, in said County, this 14th day of April, A. D. 1916.

[Seal Common Pleas Court, Cuyahoga County, Ohio.]

EDMUND B. HASERODT. *Clerk,*
By H. A. GALE, *Deputy Clerk.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 4-14-'16. H. A. G.]

Endorsed on cover: File No. 25,271. Ohio Court of Appeals, Eighth District. Term No. 469. The Valley Steamship Company, plaintiff in error, vs. John J. Wattawa. Filed April 29th, 1916. File No. 25,271.

FILED
DEC 11 1916
JAMES D. MAHER
CLERK

In the Supreme Court of the United States

THE VALLEY STEAMSHIP COMPANY,
Plaintiff in Error,
vs.
JOHN J. WATTAWA,
Defendant in Error.

No. 469
OCTOBER TERM,
1916

THE VALLEY STEAMSHIP COMPANY,
Plaintiff in Error,
vs.
JOSEPH MRAZ,
Defendant in Error.

No. 470
OCTOBER TERM,
1916

MOTION OF PLAINTIFF IN ERROR TO ADVANCE AND SPECIALLY ASSIGN.

The Valley Steamship Company, Plaintiff in Error in the above entitled cases, respectfully represents as follows:

That said cases involve the questions—

1. Whether the common or statutory law of a state defining the liability of an employer for personal injuries sustained by an employee, governs in the case of a seaman on a steamer engaged in maritime interstate commerce, or whether the maritime law of the United States on this subject exclusively applies even in a common law action in the state court.

2. Whether a state compensation law, providing for payment by employers into a state insurance fund, is applicable to companies engaged exclusively in operating steamers in interstate commerce.

3. Whether a state statute construed by the state courts so as to answer said questions in favor of the state's jurisdiction, is in violation of the constitution of the United States.

That the cases of *Schwede vs. The Zenith Steamship Company, Southern Pacific Company vs. Marie Jensen* and *Clyde Steamship Company vs. W. A. Walker,* also involved the above questions, and have been assigned for argument or reargument on January 8, 1917.

That the said case of *Schwede vs. The Zenith Steamship Company* involves the Employers' Liability Law of Ohio which has been largely superseded by the workmen's compensation legislation of said state which is involved in the above entitled cases in which The Valley Steamship Company is Plaintiff in Error; that a large part of the shipping on the Great Lakes is conducted by corporations of Ohio, few if any of which have complied with the Ohio Compensation Law, and it is desirable that their status in regard thereto be determined at as early a date as possible, which will not be accomplished in the case of *Schwede vs. The Zenith Steamship Company,* but will be accomplished by a decision in the above entitled cases of Plaintiff in Error.

WHEREFORE said The Valley Steamship Company prays that said cases may be advanced and set for hearing or submission on January 8, 1917, with or at the same time as the other cases hereinbefore mentioned, assigned for argument on said date.

THE VALLEY STEAMSHIP COMPANY,

By. Frank S. Masten

Its Attorney.

NOTICE OF MOTION.

The Defendant in Error in the above entitled cases will please take notice that Plaintiff in Error has filed its motion to have said cases advanced and set for hearing or submission on January 8, 1917, with or at the same time as the cases of *Schwede vs. The Zenith Steamship Company, Southern Pacific Company vs. Marie Jensen* and *Clyde Steamship Company vs. W. A. Walker;* and that the said motion will be submitted to the Court on Monday, December 11, 1916.

THE VALLEY STEAMSHIP COMPANY,

By. Frank. S.. Haaten.
Its Attorney.

I hereby acknowledge service of the above notice and motion, this 7th day of December, 1916, and consent that the cases be advanced and assigned as therein prayed.

Geo.. H.. Eichelberger..
Attorney for Defendants in Error.

FILED
JAN 6 1917
JAMES D. MAHER
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1916.

No. 469.

THE VALLEY STEAMSHIP COMPANY,
Plaintiff in Error,

vs.

JOHN J. WATTAWA,
Defendant in Error.

IN ERROR TO THE COURT OF APPEALS, EIGHTH DISTRICT,
STATE OF OHIO.

BRIEF OF PLAINTIFF IN ERROR.

HOLDING, MASTEN, DUNCAN & LECKIE,
Attorneys for Defendant in Error.

FRANK S. MASTEN,
TRACY H. DUNCAN,
Of Counsel.

In the Supreme Court of the United States

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STATE OF OHIO.

BRIEF OF PLAINTIFF IN ERROR.

HOLDING, MASTEN, DUNCAN & LECKIE,
Attorneys for Defendant in Error.

FRANK S. MASTEN,
TRACY H. DUNCAN,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1916.

No. 469.

THE VALLEY STEAMSHIP COMPANY,
Plaintiff in Error,

vs.

JOHN J. WATTAWA,
Defendant in Error.

IN ERROR TO THE COURT OF APPEALS, EIGHTH DISTRICT, STATE OF OHIO.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

The Valley Steamship Company, plaintiff in error here, defendant in the trial court, owned the Steamship Edwin N. Ohl, duly enrolled and licensed under the United States laws, and was an Ohio corporation engaged exclusively in operating it and other steamers in interstate commerce on the Great Lakes and connecting waters.

The plaintiff shipped on the Ohl as a common seaman,—deckhand,—in August, 1913, while the steamer was lying at the port of Manitowoc, Wisconsin. He was on board and performed his duties as such seaman on the trip from Manitowoc to Superior, Wisconsin, thence to Ashtabula, Ohio, and thence to Sandusky, Ohio; and while the steamer was lying at the latter port, in Sandusky Bay, to take on cargo for Superior, Wisconsin, the plaintiff fell through an open hatch-way whose cover had been removed preparatory to loading the cargo.

Plaintiff sustained injuries by his fall, and brought action in the Common Pleas Court of Cuyahoga County, Ohio, to recover damages therefor and obtained judgment.

At the time of the accident there was in force in Ohio the Act of May 31, 1911, of the Ohio Legislature, then constituting Sections 1465-37 to 1465-79 of the General Code of Ohio, being the first or voluntary Workmen's Compensation Law of that state. This Act established a State Insurance Fund, to be contributed to by employers and employes, and provided for payment out of the fund of compensation to injured employes, without reference to negligence or legal liability. Employers were not required to become contributors to the State Insurance Fund, but if they did not do so they became subject to the provisions of Section 21-1 as follows:

> "All employers who employ five or more workmen or operatives regularly in the same business, or in and about the same establishment, who shall not pay into the State Insurance Fund the premiums provided by this Act, shall be liable to their employes for damages suffered by reason of personal injury sustained in the course of employment, caused by the wrongful act, neglect or default of the employer, or any of the employer's officers, agents or employes, and also to the personal representatives of such employes, where death results from such injuries, *and in such action the defendant shall not avail himself or itself of the following common-law defenses:*
>
> *The defense of the fellow-servant rule, the defense of the assumption of risk, or the defense of contributory negligence.*"

Plaintiff in his petition pleaded that defendant had not contributed to the State Insurance Fund, though coming within its terms (Rec. page 43), while defendant in its answer nevertheless pleaded the defenses of assumption of risk and contributory negligence (Rec. pages 46-47). On motion (Rec. page 47), the latter was stricken

out. It is not necessary or customary in Ohio to plead the defense of fellow-servant; and on the trial all three defenses were by the charge of the court, excluded from the jury's consideration, as follows (Rec. pages 170-172):

"You have noticed and already something has been said with respect to it, that the petition alleges that the defendant employs regularly more than five workmen and did not avail itself of the provisions of an Act of the General Assembly of the State of Ohio creating a State Insurance Fund for the benefit of injured employes. This allegation is admitted, but you are instructed that the defendant was not bound to avail itself of the provisions of this act. It might or might not have done so; as the law stood at the time his cause of action arose, it was wholly optional with the defendant to avail itself of the provisions of this act or not, as it deemed best, and no inference of negligence on its part is to be inferred or assumed by you from the fact that it did not see fit to avail itself of the provisions of this act.

By reason of the provisions of this act which went into effect June 15, 1911, however, under the evidence and admissions in this case, certain common-law defenses to an action for personal injury are not available to the defendant. That is, the defense of the fellow-servant rule, the defense of the assumption of risk and the doctrine of contributory negligence is not available to the defendant in this case.

Without undertaking to define these defenses, it will be sufficient to say to you and you are instructed that if you find from the evidence and a preponderance of it, that the defendant was guilty of negligence which directly and proximately caused the injuries complained of by the plaintiff in his petition, your verdict will be for the plaintiff, even though you find the plaintiff casually shared with the defendant or participated with the defendant in the act producing the injuries of which the plaintiff complains. That is, the plaintiff is not barred of recovery even if you find he casually shared with the defendant in producing the injuries or contributed to the causes or cause producing the injuries.

To bar the plaintiff of recovery, you must find that the injuries were caused wholly and solely by his own negligence and want of ordinary care and were the proximate result of his negligence and want of ordinary care. Secondly, if the act or cause proximately producing the injuries was the act of an officer, agent or employe of the defendant, your verdict will be for the plaintiff. That is, if you find from a preponderance of the evidence that the injuries the plaintiff complains of were directly and proximately caused by an act of an officer, agent or employe of the defendant, the captain or any other officer, even a deck hand of the defendant, your verdict will be for the plaintiff, irrespective of the fact whether such officer, agent or employe was the fellow servant of the plaintiff or not.

The negligence of any servant or employe of the defendant present at the time and participating in the work or being on duty upon the deck, if the negligence of such servant or employe proximately produced or caused the injuries of the plaintiff, would be the negligence of the defendant, under the pleadings in this action.

The plaintiff did not assume the risks ordinarily incident to the business in which he was engaged at the time of the injury. The acquiescence of an ordinarily careful man in the known dangers of an employment are risks which he assumes by his contract of employment. Risks of this character, the plaintiff under the evidence in this case, did not assume, under the pleadings and under the law applicable to this case.

To be more specific, before the enactment of the statute creating a State Insurance Fund for the benefit of injured workmen, the law was in this state that a servant when he entered the service of an employer, impliedly agreed to assume all the risks, dangers and hazards ordinarily and naturally incident to the particular service in which he engaged that were known to him or which might have been known to him by the exercise of ordinary care.

Under the issues and the testimony in this case, you are instructed that the plaintiff did not assume these risks or dangers by reason of his contract of employment with the defendant.

> The statute just referred to exempts him from the assumption of these risks or dangers. This is all that is meant by the instruction; that the doctrine of assumption of risk is not available to the defendant as a defense to this action."

The negligence specified in the petition consisted in opening the hatch, failing to close it at night-fall, in not placing lights at the open hatch, in failing to guard it, in failing to keep lights in the hold under the hatch, and in not warning plaintiff (Rec. page 45).

These involved not any unseaworthiness of the steamer or its appliances, but operating negligence on the part of the crew, the fellow-servants of plaintiff.

Evidence was produced by plaintiff to prove his specifications of negligence, while defendant produced evidence tending to show that plaintiff was guilty of contributory negligence, and also assumed the risk of the open hatch and other conditions, as an incident of the employment. It will not, however, be necessary to refer to the evidence, as the applicability thereto of the three common-law defenses is sufficiently indicated by the court's instructions thereon to the jury, quoted above.

To reverse the judgment of the Common Pleas Court, petition in error was filed in the Court of Appeals, in which court the defendant invoked the Interstate Commerce and Maritime clauses of the Federal Constitution; as will be seen not only from the petition in error (Rec. pages 50-51), and opinion of the Court (Rec. pages 209-210, but especially in the brief (Rec. pages 175-209) filed in accordance with court rule (Rec. page 210), in which the constitutional questions are elaborately discussed.

It is not necessary to follow the record back further than this, it being sufficient if the federal questions are raised for the first time in the Appellate Court.

Rothchild vs. Knight, 184 U. S., 334.

Upon the judgment being affirmed by the Court of Appeals, petition in error was filed in the Supreme Court of Ohio as matter of right, on the ground that the above mentioned federal questions were involved; and motion was also filed in that court to certify the record, on the ground that questions of public and great general interest were involved as well. The Supreme Court denied the motion and struck the petition in error from the files, thereby refusing to review the case. Writ of error was allowed by the Chief Justice of Ohio to this Court, and the case filed as Number 546, October term, 1915; but on motion, this Court dismissed the writ on the ground that the Ohio Supreme Court having in fact refused to review, the Court of Appeals was the highest court in which a decision could be had.

Valley Steamship Co. vs. Wattawa, 241 U. S. 642.

Thereupon, on application of defendant, a writ was allowed by Mr. Justice Holmes to the Court of Appeals, whose judgment, affirming that of the Common Pleas Court, it is the purpose of the present proceeding to reverse.

The Ohio Compensation Act involved in this case, is the one whose general constitutionality was sustained by the Ohio Supreme Court in

State ex rel. Yaple vs. Creamer, 85 O. S., 349,

and whose constitutionality was sustained by this Court in

Jeffrey Mfg. Co. vs. Blagg, 235 U. S., 571,

on the single ground involved in that case.

SPECIFICATION OF ERRORS.

The Court of Appeals of Ohio, as the highest court in which a decision could be had, having both by its judgment and opinion, construed the Ohio Compensation Act to be applicable to the employment of seamen on steamers engaged exclusively in interstate commerce on the Great Lakes, the question submitted to this court is whether the Act so construed is in violation of the Federal Constitution.

The first and second assignments of error object in general terms to the affirmance by the Court of Appeals of the judgment of the Common Pleas Court; and the constitutional questions involved in such affirmance are stated in the following specifications (Rec. 33-34):

> "Third. Said Court erred in adjudging by its action aforesaid, that the liability of a corporation of Ohio owning and operating steamers upon the Great Lakes and their tributary and connecting waters to a seaman injured in the course of his employment on one of said steamers while within the State of Ohio, by reason of the alleged negligence of said corporation, is to be determined by the common law and statutes of the State of Ohio, and not by the maritime law of the United States, contrary to Article 3, Section 2, and Article 6, Clause 2, of the Constitution of the United States.
>
> Fourth. Said Court erred in adjudging by its action aforesaid, that it is competent for the Legislature of Ohio to change the maritime law of the United States by abolishing the defenses of contributory negligence, the fellow servant rule and assumption of risk, and allowing recovery of full indemnity by a seaman injured in his employment and not merely the expense of his maintenance and cure, although the steamer was not unseaworthy and its owner had not failed to supply and keep in order the proper appliances appurtenant thereto, contrary to Article 3, Section 2, and Article 6, Clause 2, of the Constitution of the United States.

Fifth. Said Court erred in adjudging by its action aforesaid, that it is competent for the Legislature of Ohio to require a corporation of Ohio, engaged exclusively in interstate commerce upon the Great Lakes and their tributary and connecting waters, to pay premiums into a State Insurance Fund to provide for the payment of compensation to the employes of such corporation receiving injuries in the course of their employment, regardless of whether there be any liability for such injuries under the maritime law of the United States or the common law or statutes of the State of Ohio, contrary to Article 1, Section 8, Clause 3, of the Constitution of the United States."

These questions as related specifically to the Ohio Compensation Law, are stated in the sixth, seventh and eighth assignments; and the particular action of the Common Pleas Court involving them, and which became effective by the affirmance by the Court of Appeals of the judgment, are stated in the remaining assignments (Rec. pages 34-36). As the questions here involved are sufficiently stated in the third, fourth and fifth assignments, it does not seem necessary to quote the others.

If the decision of this court is favorable to plaintiff in error on any of its contentions, this will require judgment to be entered for plaintiff in error, rather than the cause remanded for a new trial. The nature of the accident (falling into an open hatch), and the plaintiff's specifications of negligence on which the case was necessarily tried, make sufficiently manifest that the accident was not due to any unseaworthiness of or deficiency in the steamer or its appliances, but to operating negligence, that of fellow-members of the crew, which prevents recovery equally under the maritime law, or the common law when unimpaired by the statute herein complained of.

BRIEF OF ARGUMENT.

I. As the Ohio Compensation Act deprived defendant of the common-law defenses of contributory negligence, the fellow-servant rule and assumption of risk, it so far constituted and may be treated as an Employer's Liability Act, similar to that which preceded the Compensation Act in Ohio (Norris Law), involved in the case of *Schwede vs. The Zenith Steamship Company,* to be argued with this case. Our First Point is, that such a state enactment, so far as applied to the employment of seamen on a steamer operating on the navigable waters of the United States, and to a personal injury arising in the course of such employment and occurring on said waters, and in such locality, therefore, as would satisfy the conditions for admiralty jurisdiction in tort, is in violation of the maritime grant contained in Article III., Section 2, of the Federal Constitution.

II. The Ohio Act is, however, primarily a Compensation Act, providing for contribution to a State Insurance Fund and payment of arbitrary compensation. Our Second Point is that, even if it were competent for the State by its common or statutory law, to regulate liability in the maritime employment, the enactment of such a Compensation Act, depriving the employer who does not contribute to the fund, of those common-law defenses which are preserved to those who do contribute, is in violation of said maritime grant.

III. Plaintiff's steamers, as well as most steamers on the Great Lakes, operate between the different states; and our Third Point is that the Act, whether regarded as an Employer's Liability Act or as a Compensation Act, as applied to steamers engaged in maritime interstate commerce, is also in violation of the interstate commerce grant contained in Article I., Section 8, Clause 3.

The constitutionality of Employer's Liability Acts is involved in the case of *Schwede vs. Zenith Steamship Company,* and of *Compensation Acts* in the cases of *Southern Pacific Company vs. Jensen* and *Clyde Steamship Co. vs. Walker,* already argued in this court and now assigned for re-argument, and in which elaborate briefs have been filed. We shall, therefore, be confined to a more summary statement of our position.

I.

EMPLOYER'S LIABILITY ACTS AND THE MARITIME LAW.

It will serve to define the issue, and its relationship, if we consider first those principles which are fully established, and which for both sides must constitute the premises of argument.

1. Article III., Section 2, is primarily, as it is in form, a grant of judicial power, and makes the federal jurisdiction paramount. It would, therefore, have been, and would be, competent for Congress to confer exclusive jurisdiction in all maritime cases upon the federal courts.

The Fred E. Sander, 208 Fed., 724, 727.

2. Congress, however, has seen fit to save to suitors "the right of a common-law remedy where the common law is competent to give it," and it is to this saving clause that the state courts must look for any jurisdiction in maritime cases.

3. While the grant is in form a judicial grant, by necessary implication it constitutes also a grant to the federal government of legislative jurisdiction, which equally with the judicial, is paramount.

Butler vs. Boston S. S. Co., 130 U. S., 527, 556.
The Hamilton, 207 U. S., 398.
City of Norwalk, 55 Fed., 98, 105.

4. As to territory, the maritime jurisdiction is coextensive with the navigable waters of the United States, including the Great Lakes and their tributary and connecting waters.

Butler vs. Boston S. S. Co., 130 U. S., 527.
The Genesee Chief, 12 How., 434.

5. As to subject-matter, the maritime jurisdiction is a matter of judicial definition, and Congress cannot enlarge it, but only legislate therein.

Butler vs. Boston S. S. Co., 130 U. S., 527, 557.
The Belfast, 7 Wall. 624, 640.

6. This federal jurisdiction in maritime matters is independent of the interstate commerce clause and is not confined to interstate commerce, although to a considerable extent the two overlap, in which common ground both the maritime and commerce grants may be invoked for jurisdiction.

In re Garnett, 141 U. S., 1, 12.
The Belfast, 7 Wall, 624, 640.

7. As in the analogous case of interstate commerce, the state may legislate by virtue of its general sovereignty, as in local and police matters, although operative on water as well as on land and therefore incidentally affecting maritime matters, unless and until the matter is dealt with by the federal government.

U. S. vs. Bevans, 3 Wheat, 337, 387.
City of Norwalk, 55 Fed., 98, 106.

8. This legislative power of the state is also derived from the saving of the common-law remedy, authorizing the state by legislation to develop and change its common-law as related to maritime matters, unless and until the matter is dealt with by the federal government.

The Hamilton, 207 U. S., 398.

9. When the state, in pursuance of its legislative power in maritime matters, creates new rights or remedies of a maritime character and not inconsistent with

the federal maritime law, these will be enforced by the federal admiralty courts as a part of the maritime law.

The Lottawanna, 21 Wall., 558.
The Corsair, 145 U. S., 335.
City of Norwalk, 55 Fed., 98.
The Hamilton, 207 U. S., 398.

10. The maritime law consists of the general system recognized at the time of the adoption of the constitution, with such legislative development and modification as has occurred subsequently.

The Lottawanna, 21 Wall., 558.
Butler vs. Boston S. S. Co., 130 U. S., 527.

11. The maritime law, without legislative addition, completely defines the liability of employer to seamen sustaining injuries while engaged in their employment on the navigable waters of the United States. This law imposes on the employer the obligation of maintenance and cure and payment of wages, irrespective of negligence on either side; but imposes no obligation to indemnify even in case of negligence, except where the ship or its appliances are unseaworthy.

The Osceola, 189 U. S., 158.
City of Alexandria, 17 Fed., 390.

12. This maritime law will be applied in admiralty courts to the exclusion of the municipal law, common or statutory, of the state.

Workman vs. New York City, 179 U. S., 552.

The foregoing principles bring us to the question at issue: *Whether the maritime law governs the liability of employer to seamen in a common-law action in the state court as well as in the federal admiralty court, and whether the right of the state by its legislation to modify the common law and incidentally affect maritime matters authorizes legislation on the subject of the maritime employer's liability.*

It will be noted that while the fundamental question is whether the maritime law, common or statutory, is to govern in a common-law action, rather than the maritime law, the question arises on the validity of a state statute. The reason that the question arises in this form, is because the maritime law and common law of employer's liability, are practically identical so far as obligation to pay damages is concerned, and the question does not arise until the state adopts a statute changing the common law and thereby causing a variation from the maritime law.

This will be manifest from a consideration of the maritime liability, and of the principal provisions of the recent statutes. So far as damages are concerned (that is, except as to maintenance and cure and wages), the maritime law imposes no liability for negligence on the employer, unless he fails to provide a seaworthy ship or appliances. This result is arrived at through regarding the crew as fellow-servants:

> "That all the members of the crew, except perhaps the master, are as between themselves fellow-servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew, beyond the expense of their maintenance and cure."
>
> *The Osceola* at page 175,

and applying the doctrine of assumption of risk:

> "A seafaring life is a dangerous one, accidents of this kind are peculiarly liable to occur, and the general principle of law that a person entering a dangerous employment is regarded as assuming the ordinary risks of such employment, is particularly applicable to the case of seamen."
>
> *The Iroquois,* 194 U. S., 240, 243.

Therefore the common law which allows the defense of fellow-servant and assumption of risk, as well as contributory negligence, but makes the employer liable for failure to provide a safe place in which to work, is ident-

ical in its results with the maritime law; but when a statute is enacted abolishing these defenses, then the question of whether the maritime or municipal law is to govern, becomes material.

This explains the wonder expressed on behalf of some of the plaintiffs, that despite the frequency of injuries to seamen and of common-law actions therefor, the question of whether the maritime law controls has seldom if ever been raised, until within the last few years. This is because it is only in the last few years that such statutes have been passed, until which time the question was academic.

Within the last few years there has been a considerable crop of decisions and dicta on this question, both reported and unreported, in the State and District Courts. These are collated in the briefs filed in the other cases to be argued with this case, and repetition or discussion of them in this brief would seem to serve no purpose. By this court the question has not yet been decided.

Nor has there been any decision by this court on the underlying question: whether the saving to suitors of a common-law remedy where the common law is competent to give it, permits the state court to apply its own substantive law, even where the maritime law has its own distinctive rules of decision on the subject, or whether in such case, the saving to the suitor is only of the state forum and forms of remedy, but with the maritime law applying as the rule of decision.

In fact, there has been no general analysis or definition in the decisions of this court, of the "common-law remedy" that is saved to suitors.

All the decisions, we believe, have dealt with specific remedies; being mostly concerned with the disapproval of actions *in rem* created by the state statutes,

The Moses Taylor, 4 Wall., 411,
Hine vs. Trevor, 4 Wall., 555,
The Belfast, 7 Wall., 624,
The Glide, 167 U. S., 606,
The Robert W. Parsons, 191 U. S., 17,

and approval of state liens to be enforced only by attachment or equitable foreclosure, or other process auxiliary only to an action *in personam*.

Leon vs. Galceran, 11 Wall., 185,
Johnson vs. Elevator Co., 119 U. S., 388,
Knapp vs. McCaffrey, 177 U. S., 638,
Rounds vs. Cloverport Foundry, 237 U. S., 303,

and there seems to be almost no general characterization of the saving clause except the much quoted statement in *The Moses Taylor*, that "it is not a remedy in the common-law courts which is saved, but a common-law remedy," which does not have much significance outside of that case, and affords no general talisman whatever.

The question, therefore, is one that must be decided on principle; and the controlling principle, we submit, is that *the purpose of granting to the federal government paramount maritime jurisdiction, is to preserve a uniform maritime law as among the several states*, as well as in relation to foreign states. This would have been accomplished without dispute if Congress had preserved exclusive jurisdiction in the federal courts, as was competent to be done; and in permitting suitors to have recourse to the state forum, Congress should not be presumed to have intended to permit judicial, and still less, legislative encroachment on the maritime law by the several states.

The nature and necessity of such uniform maritime law has frequently been stated, as in

Workman vs. City of New York, 179 U. S., 552,
Magee vs. The Lyndhurst, 48 Fed., 839, 841.
Mack S. S. Co. vs. Thompson, 176 Fed., 499, 503.

And while these are admiralty cases, and their statements are directed against attempts of the State to interfere with the maritime law as administered in the admiralty courts, nevertheless the principle stated is equally applicable, whatever the forum in which the maritime law is being applied.

The most celebrated statement is contained in

Workman vs. City of New York (page 558):

> "The practical destruction of a uniform maritime law which must arise from this premise, is made manifest when it is considered that if it be true that the principles of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts, can be overthrown by conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one State and one in another; one thing in one port of the United States and a different thing in some other port. As the power to change state laws or state decisions rests with the state authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever-abiding, would be purely local—would be one thing today and another thing tomorrow. That the confusion to result would amount to the abrogation of a uniform maritime law is at once patent."

The mutual rights and obligations of steamer and crew is a subject-matter peculiarly appertaining to the maritime law and has been from time immemorial, and is a matter peculiarly demanding its uniformity.

It will not be doubted that, as stated by the Circuit Court of Appeals for the Second Circuit in

Cornell Steamboat Co. vs. Fallon, 179 Fed., 293:

> "The contract between the defendant and the deceased is a maritime contract, and establishes their relation as well in courts of law as in courts of admiralty."

In fact, seaman have long been the "wards of the admiralty," and "their wages, their rights, their wrongs and injuries have always been a special subject of the admiralty jurisdiction" (Benedict's Admiralty, Section 182); and as stated by Hughes in his work on admiralty, page 21:

> "The contracts of seamen have always been considered among the most important in the admiralty, as a good crew is the most important outfit that a ship can have."

The seaman has also been the object of solicitous legislation by Congress. For instance, there must be shipping articles in a form carefully prescribed by the United States government. There are many provisions as to wages and method of payment, and forbidding their assignment or attachment; regulating the character and amount of food, medicine, etc., with which a seaman must be furnished; the amount of space he must be allowed and method of his treatment as to punishment, forfeiture of wages, etc.; the method of his discharge and return to this country are carefully defined, and many other matters establishing the rights and liabilities as between ship and seaman.

These rights and liabilities have always been a matter of national concern and fixed policy, are now determined by national policy, and it would be contrary to this national policy to permit a state to change them, and instead of having a national policy on a national subject, to have these well-known rights and liabilities change with every jurisdiction into which a ship may go.

The situation in the present case is typical. The owner is an Ohio corporation and the hiring of the plaintiff seaman was in Wisconsin; but both of these facts are accidental and should have no significance as to the rights and obligations of the parties. The hiring was made by signing of the regular shipping articles, pursuant to the United States Statutes, and plaintiff was not employed to work either in Wisconsin or Ohio, or in any particular place, other than on board the steamer wherever she might go on the Great Lakes and their harbors. It is manifest that the rights and liabilities between the parties should be determined by that law which is common to the navigable waters of all the states, rather than by the law of the particular state in which the plaintiff's ship might happen to be when plaintiff happened to be injured.

As to the practical inconvenience and inconsistency of permitting the varying state laws to apply, we cannot do better than to refer to the statement of the District Court in *Schwede vs. Zenith Steamship Company*, as reported in 216 Fed., 566.

Such additional reasons as we have to urge in favor of applying the maritime law, may best be developed in considering the principal reasons urged in favor of the common-law jurisdiction.

Absence of Legislation by Congress.

It is asserted that the state law, common or statutory, is operative until Congress acts, as it has recently done in Section 20 of the Seamen's Act. This assertion we believe is founded on a false analogy with the situation in interstate commerce.

There is no doubt of the power of a state to regulate the liability of employers engaged in interstate commerce on land, notably the railroads, until Congress acts. This

is because there is no federal common law, but only the common law of each state, so that the field is left lawless, unless the state law is applied, including both the common law and such modifications as from time to time are made by statute.

Smith vs. Alabama, 124 U. S., 465.

This is pointed out in the opinion, at page 477, as follows, the italics being ours:

> "But for the provisions on the subject found in the local law of each State, there would be no legal obligation on the part of the carrier, whether *ex contractu* or *ex delicto*, to those who employ him; or if the local law is held not to apply where the carrier is engaged in foreign or interstate commerce, then, in the absence of laws passed by Congress or presumed to be adopted by it, there can be no rule of decision based upon rights and duties supposed to grow out of the relation of such carriers to the public or to individuals. In other words, if the law of the particular State does not govern that relation, and prescribe the rights and duties which it implies, then there is and can be no law that does until Congress expressly supplies it, or is held by implication to have supplied it, in cases within its jurisdiction over foreign and interstate commerce. The failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the state law, which until displaced covers the subject.
>
> *There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several States each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes.*"

But it is not true that there is no "common law of the United States" on water, or that in maritime matters there is no rule of decision until Congress acts. *The maritime law, as existing when the Constitution was adopted, is the common law of the United States in mari-*

time matters, and affords explicit rules of decision on the liability of maritime employers to their employes. The failure of Congress to legislate in maritime matters, does not constitute an adoption of the common law of the state, *but is an acquiescence in the maritime law of the United States.*

When Congress acts to regulate the liability of the employer in interstate commerce on land, as when it adopted the Railroad Employer's Liability Law, it displaces the *common law or statutes of the states.* When Congress acts to regulate the liability of maritime employers, as when it adopted Section 20 of the Seamen's Law, it displaces the *maritime law of the United States.* In the one case it enacts a new federal law; in the other it amends the existing federal law.

Some of the maritime decisions employ the loose statement that the state may legislate until Congress acts, but their undoubted meaning is only that the state may legislate unless and until there is a federal law on the same subject. It is not a federal *statute* that prevents or displaces state action, but a federal *law.* The proper statement of the rule is that of Justice Brown in *The City of Norwalk,* at page 112:

> "From that decision it necessarily follows, that within the sphere in which the municipal law is valid and operative, viz., within the navigable waters of the state, the state law, in the absence of any act of congress, as to the survival of any such right of action, *or any distinctively maritime rule applicable to the case,* must furnish the rule of law as to the right of recovery."

The adoption of the maritime law as existing when the Constitution was adopted, by the maritime grant of the Constitution, constituted the maritime law a body of federal law. It has original *constitutional* sanction, as distinguished from subsequent *congressional* sanction. It has equal force and effect as an act of Congress,

it would have no more validity or sanction if adopted expressly by an act of Congress, and it therefore excludes operation of the state law exactly as would the act of Congress.

If the maritime law did not provide for the liability of employer to seamen, it would be competent for the state to apply its own law in its own court; but as the maritime law does regulate this liability, the state court is in the same position in a case involving a maritime employer's liability, as in a case involving an interstate railroad's liability since the passage of the Railroad Employer's Liability Law—in each case the respective federal law must be applied.

The concession, which cannot be avoided, that when Congress acts to change the maritime law defining the liability of employers, as it has done in Section 20 of the Seamen's Law, this displaces the state law and must be applied in the state courts, is necessarily decisive of the whole question. For the original and principal thing is the maritime common law, if we may so style it, as defined in *The Lottawanna*, and the only function of Congress is to change or extend it, within the scope of maritime jurisdiction as judicially determined. If such changes and extensions of the maritime law are to be paramount, and exclude or displace the common or statutory law of the state, a *fortiori* must the body of law which is being thus changed or extended, have the same effect.

Lien and Death Statutes.

A state may, by statute, create a lien for supplies furnished in the home port, and other such maritime claims and contracts, for which the maritime law gives no lien. Not only can such lien be enforced in an action *in personam* in the State Court, but it will be recognized

and enforced by an action *in rem* in the federal admiralty court.

The Lottawanna, 21 Wall., 558.
The J. E. Rumbell, 148 U. S., 1.

Also, a state may, by statute, create a cause of action for wrongful death; and not only can it be enforced in the state court, although caused by a maritime tort, but it will be recognized and enforced in the admiralty court, by an action *in rem*, if the state gives a lien, or otherwise by an action *in personam*.

Steamboat Co. vs. Chase, 16 Wall., 522.
The Corsair, 145 U. S., 335.
The Hamilton, 207 U. S., 398.
The City of Norwalk, 55 Fed., 98.

It is asserted that such lien and death statutes are on a parity with Employer's Liability statutes, and that if it is competent to enact the former and enforce them in respect to a maritime subject-matter, it is equally competent to enforce Employer's Liability statutes against maritime employers.

There is, however, a vital difference between the lien and death statutes on the one hand, and the Employer's Liability statutes on the other. There was no lien for supplies in the home port, or action for wrongful death, in the maritime law as adopted by the Constitution; and state statutes giving such lien and such action, are valid because they occupy ground that the maritime law has not covered, while the Employer's Liability statutes attempt to seize ground fully occupied by the maritime law. The lien and death statutes are in exercise of the state's right of legislation in extension of the common law remedies preserved under the saving clause, unless and until the federal government acts; while in the case of Employer's Liability statutes, legislation by the state is prohibited in advance by the fact that such liability is completely defined by the federal law.

It is ingeniously argued, however, that when the maritime law fails to give a lien for supplies in the home port, etc., and fails to give an action for death, it is an assertion that there shall be no lien for such supplies, or action for wrongful death; that a state statute counter to such negative provision of the maritime law is just as much in conflict therewith as a state statute counter to a positive provision; and that if the maritime law nevertheless does not exclude the lien and death statutes, it does not exclude the liability statutes.

It is not true, however, that such negative attitude of the maritime law on certain subjects is the same as a positive provision. The fallacy is in assuming that the maritime law is a complete whole, so that whatever it does not give, it denies.

On the contrary, the maritime law, as already stated, does not fully occupy the maritime field, and the unfilled portion which occurs in the border-land between the maritime and municipal law, is a field for state action, as well as federal, so long as not inconsistent with the positive provisions of the maritime law. It declares, not that there shall be no lien, or that there shall be no action for death, but only that so far there is not; and as these subjects are maritime in their nature, and the lien or action is not in conflict with the principles of the existing maritime law, the state supplies the deficiency, and the new rights and remedies will be recognized and enforced in the admiralty as well as the state courts.

But the liability of employer to seaman, being fully covered in the maritime law when the Constitution was adopted, belongs in that part of the field already occupied, and the state is accordingly excluded.

The decisions upholding the validity of the lien and death statutes, are expressly put on the basis stated above: that the maritime law is not complete, that in the border-land it adopts and assimilates the municipal law

when not in conflict with the principles of the maritime law, and that it is by virtue of this that the maritime law not only recognizes lien and death statutes, but the admiralty court will enforce them as part of the maritime law. Thus as to the lien statutes it is said in *The Lottawanna* at page 573:

> "This account of the maritime law, if correct, plainly shows that in particular matters, especially such as approach a merely municipal character, the received maritime law may differ in different countries without affecting the general integrity of the system as a harmonious whole. The government of one country may be willing to give to its citizens, who supply a ship with provisions at her home port where the owner himself resides, a lien on the ship; whilst that of another country may take a contrary view as to the expediency of such a rule. The difference between them in a matter that concerns only their own citizens, in each case, cannot seriously affect the harmony and consistency of the common maritime law which each adopts and observes.
>
> This view of the subject does not in the slightest degree detract from the proper authority and respect due to that venerable law of the sea, which has been the subject of such high encomiums from the ablest jurists of all countries; it merely places it upon the just and logical grounds upon which it is accepted, and with proper qualifications, received with the binding force of law in all countries."

And Justice Brown discusses the death statutes in *The City of Norwalk*, at pages 107-108, as follows:

> "Still further, it must be borne in mind that the maritime law is not in itself a complete and perfect system. In all maritime courts there is a considerable body of municipal law that underlies the maritime as the basis of its administration. Strictly speaking, the maritime law is that alone which is peculiar to, or which specially concerns, maritime transactions. The general body of the law as regards the ordinary, fundamental rights of persons and property, whether on land or sea, is, as observed by Mr. Justice Field in the passage above quoted, derived from the constituted order of the state, i. e.,

from the municipal law, which courts of admiralty to a considerable extent must necessarily adopt and follow, subject only to the modifications which the special characteristics of the law of the sea impose on maritime subjects. These general rights and regulations of persons and property are subject to the control of the state and may be changed as the state sees fit, if they are not regulated by Congress and do not trench upon its exclusive authority. The administration of the law in the maritime courts of different coutries, therefore, though it might be the same in all that is peculiar to the maritime law, might in other respects differ widely, through the differences in the municipal law which in part enter into the adjudication of maritime causes.

It was upon the recognition of this principle alone, as I understand, that in the case of *The Harrisburg*, 119 U. S., 199, 213, it was decided that no action could be maintained in a court of admiralty of this country for loss of life, aside from statutory authority; namely, because there is no rule on this subject belonging specially to the maritime law as such. 'It (the maritime law) leaves the matter untouched.' Page 213, 119 U. S. And since the maritime courts in each country follow their own municipal law as regards giving damages for death; and inasmuch as by the common law of this country such a cause of action does not survive,—the latter rule must, therefore, obtain in our courts of admiralty. In other words, it is the municipal law that on such a point determines the law applicable in a court of admiralty."

There is in these and the other lien and death cases no indication of anything other than a purely negative attitude of the maritime law on these subjects; and in *The Harrisburg*, 119 U. S., 199, the court after discussing the municipal law and the foreign maritime law says, page 213, the italics ours:

> "But however this may be, we know of no country that has adopted a different rule on this subject for the sea from that which it maintains on the land, and the maritime law, as accepted and received by maritime nations generally, *leaves the matter untouched.*"

And as to this, Justice Brown in *The Norwalk*, further says on page 112:

> "In the case of *The Harrisburg*, 119 U. S., 199, the libel was dismissed, not because of any lack of jurisdiction, but because of the absence of any act of congress creating the right; and because 'the maritime law, as accepted and received by maritime nations generally, *leaves the matter untouched,*' and the consequent absence of any distinct rule in the maritime code; and therefore the courts of admiralty, it was held, must take their rule on that subject from the municipal law. From that decision it necessarily follows, that within the sphere in which the municipal law is valid and operative, viz., within the navigable waters of the state, the state law, in the absence of any act of congress, as to the survival of any such right of action, or any distinctively maritime rule applicable to the case, must furnish the rule of law as to the right of recovery."

In fact, the argument that Employer's Liability statutes are on a parity with lien and death statutes and can claim identical sanction, proves too much. For the lien and death statutes are enforced, not only in the state court, but in the admiralty court; so that if the Employer's Liability Laws are on a parity with them, then the state liability laws also would be enforceable in the admiralty court. It is settled, however, that this will not be done, but that the state statutes will be disregarded, and the maritime law applied.

The Fred E. Sander, 208 Fed., 724.
The Thielbek, 211 Fed., 685.
Tropical Steamship Co. vs. Towle, 222 Fed., 867.

Contributory Negligence.

As has been already stated, there has, within the last few years, been a number of decisions upholding application of State Liability Laws to personal injuries occurring on shipboard.

On examination, however, we believe that in these cases without exception, the plaintiff was a stevedore engaged in loading or unloading the steamer while she lay at dock; as

La Compagnie Trans Atlantique vs. Maguire, 168 Fed., 134.
Stoll vs. S. S. Co., 205 Fed., 169.
Murray vs. S. S. Co., 207 Fed., 688.
Berton vs. Drydock Co., 219 Fed., 763.
Swayne vs. Barsch, 226 Fed., 581.
Keithley vs. S. S. Co., 232 Fed., 255.
Lindstrom vs. S. S. Co., 132 Minn., 328.

Counsel for the defendant in error in *Schwede vs. The Zenith Steamship Company,* argued with this case, has distinguished that case from the above, on the ground that the former involved a seaman and the latter a stevedore, and this distinction is made also in *Berton vs. Drydock Company, supra,* as well as in the dissenting opinion in *Swayne vs. Barsch, supra.*

Counsel for the plaintiffs, however, in the cases pending in this Court, challenge the validity of this distinction, by pointing out that not only is the injury to the stevedore within the jurisdiction of the admiralty so far as locality is concerned, but is also a maritime subject-matter, as held by this Court in *Atlantic Transport Company vs. Imbrovek,* 234 U. S., 52, so that the stevedore's employment is maritime no less than that of a seaman; that in an action by a stevedore in the admiralty court, contributory negligence results in division of damages, instead of defeating recovery as at common law, as held in *The Max Morris,* 137 U. S., 1, whereas in a common

law court the doctrine of division of damages cannot be applied, as held in *Belden vs. Chase,* 150 U. S., 674.

We submit, however, that the distinction between seaman and stevedore is valid, not because the stevedore's tort is any less a maritime matter than a seaman's, but because the maritime law furnishes a distinctive rule as to the obligations of employer to seaman, and the liability resulting from its non-performance, while there is no such distinctive rule in the case of a stevedore.

Division of damages is a general doctrine of the admiralty court, and it has never been claimed that its peculiar rules, procedure and practices will be carried over into a common-law court, because the case is maritime; but as early pointed out by this Court:

> "Different systems of pleading and modes of proceeding, and different rules of evidence prevail in the two jurisdictions, but whether the party elects to go into one or the other, he must conform to the system of pleading and to the rules of practice and of evidence, which prevail in the chosen forum. State statutes, if applicable to the case, constitute the rules of decision in the common-law actions, in the Circuit Courts as well as in the state courts, but the rules of pleading, practice and of evidence in the admiralty courts are regulated by the admiralty law as ultimately expounded by the decision of this Court. State legislatures may regulate the practice, proceedings and rules of evidence in their own courts, and those rules under the 34th Section of the Judiciary Act, become, in suits of common law, the rules of decision where they apply in the Circuit Courts."
>
> *Steamboat Co. vs. Chase,* 16 Wall., 522, 534.

The particular doctrine of the admiralty requiring division of damages, is a matter of this kind. As pointed out in *The Max Morris,* the rule arose in cases of collision between two steamers, the liability of each being determined according to the principles of liability, and the damages thus determined added together and divided; and in personal injury cases this results in dividing the

plaintiff's damages by half. In its origin and essence it is not an ingredient in determining the liability for damages, as contributory negligence is at common law, but is a matter of dealing with and distributing the damages after they have been determined.

The doctrine of division of damages is applied in case of injury to a stevedore, in the same way as in damage to a steamer, or any other maritime tort; and in determining the liability to the stevedore of a steamship company, or of a dock company as was involved in the *Imbrovek* case, no special rules of liability exist in the maritime law, because there is no special relationship between the stevedore and the steamship company or the dock company.

Whereas, as stated by the court in *The Santa Clara,* 206 Fed., 179, 180: "The relation of seamen to shipowners is peculiar," and we have the peculiar and distinctive rights and duties resulting from that relationship, as declared in *The Osceola* and other cases. These prevent recovery by a seaman for ordinary negligence on the ground that while the employer must maintain and cure the injured seaman, any further liability by reason of negligence is defeated by the members of the crew being all sent forth on and engaged in a common employment; that is, it is the rules of fellow servant and assumption of risk that intervene, and not contributory negligence; for, as stated in

The City of Alexandria, 17 Fed., 390:

> "By the maritime law, the mere ordinary negligence of the seaman, though that be the sole cause of the accident, makes no difference in his right to be cured at the ship's expense, and to his wages to the end of the voyage. And as his own negligence does not debar him from these rights by the maritime law, so, conversely, these rights are in no way extended, though his hurts have arisen by the negligent acts of others of the ship's company. In effect, the maritime law makes no account of mere ordinary negli-

gence in such cases. More or less negligence is in fact to be expected, and the rules long established as regards the relief to be afforded, are irrespective of such negligence, whether by the seaman or others."

,We submit, therefore, that the right of a stevedore to recover in a common-law action according to the rules of liability of the common-law, and the fact that these rules defeat recovery for contributory negligence, whereas the admiralty rule divides the damages, are not inconsistent with our contention, that the maritime rule of liability as to seamen must be applied in the common-law courts.

II.

COMPENSATION ACTS AND THE MARITIME LAW.

While the Ohio law under consideration was in its effect, and has accordingly so far been discussed as a Liability Act, it was also, and primarily, a Compensation Act. The preceding argument is equally applicable to a Compensation Act, but there are additional considerations applying to the latter, so that even if the contention as to *liability* legislation should be overruled, nevertheless we believe that *compensation* legislation is obnoxious to the maritime grant.

And particularly obnoxious are those Compensation Acts which take the form of an insurance scheme. Indeed, a law simply substituting compensation for damages, allowing the former to be recovered by action in the same manner as damages, might be sustained, if liability legislation is sustained, and yet the insurance form of compensation law be condemned.

The Ohio Act adopted the scheme of State Insurance. It is entitled:

> "An Act to create a State Insurance Fund for the benefit of injured, and the dependents of killed employes, and to provide for the administration of such fund by a State Liability Board of Awards."

It provides in Section 18 that:

> "The State Liability Board of Awards shall establish a State Insurance Fund from premiums paid thereto from employers and employes as herein provided, according to the rates of risks in the classes established by it, as herein provided, for the benefit of employes of employers that have paid the premium applicable to the classes to which they belong and for the benefit of the dependents of such employes, and shall adopt rules and regulations with respect to the collection, maintenance and disbursement of said fund."

And in Section 20-1 it is provided that:

> "Any employer who employs five or more workmen or operatives regularly in the same business, or in or about the same establishment, who shall pay into the State Insurance Fund the premiums provided by this Act, shall not be liable to respond in damages at common law or by statute, save as hereinafter provided, for injuries or death of any such employe, wherever occurring during the period covered by such premiums, provided the injured employe has remained in his service with knowledge that his employer has paid into the State Insurance Fund the premiums provided by this Act; the continuance in the service of such employer with such knowledge, shall be deemed a waiver by the employe of his right of action as aforesaid."

The exception thereinafter provided in the immunity of those paying the premiums, is where the employer fails to comply with any statute or other regulation for the protection of employes, or in case of the employer's willful act (Section 21-2); while employers not paying premiums are to remain liable for damages without benefit of the common-law defenses, as provided in Section 21-1 already quoted on page 2 of this brief.

The nature and provisions of this Act are stated in the opinion of this Court in *Jeffrey Mfg. Co. vs. Blagg*, 235 U. S., 571, 573.

It is true that compliance with the law purports to be voluntary, but in fact compliance is coerced by the deprivation of the common-law defenses as penalty for not complying. Similar statutes in some states seek to avoid the form of making such deprivation a penalty, by abolishing the defenses in general terms, and then making exception in favor of those complying with the compensation act. But that of Ohio is in form as well as in fact a penalty, the provisions of Section 21-1 being that those employers who do not comply shall be liable to action for damages, and in such action shall not avail themselves of the common-law defenses.

The imposition of this penalty, the discrimination against employers who do not elect to come under the law, when affecting or applied against employers in maritime and interstate commerce, produces the same legal situation as a compulsory law. It is an entirely different matter from local conditions, in regard to which this feature of the Act was held not to be an unconstitutional discrimination, in *Jeffrey Mfg. Co. vs. Blagg*, at page 577.

While the Act excepts from liability for damages at common law or by statute, those employers who contribute to the fund, penalizing those who do not, by withdrawing their common-law defenses, yet it cannot be gainsaid that although a maritime employer elects to and does contribute to the fund, *the State law nevertheless cannot protect him against an admiralty proceeding.*

Workman vs. New York City, 179 U. S., 552.
The Henry B. Smith, 195 Fed., 312.
The Fred E. Sanders, 208 Fed., 724.
The Thielbeck, 211 Fed., 685.
Tropical S. S. Co. vs. Towle, 222 Fed., 867,

the last mentioned decision being by the Circuit Court of Appeals for the Fifth Circuit.

In *The Henry B. Smith,* the court said:

> "The maritime law which the libelant invokes, cannot be altered, modified or changed by state enactment. The right of action arising out of maritime tort relating to the recovery of damages for personal injuries, depends upon the maritime law, which has been adopted by the laws and usages of the country. There is moreover no maritime lien by the statutes of this state to support this proceeding *in rem,* and I am constrained to hold that in an action for personal injuries the Employer's Liability Act of the State has no application. Rights in action in admiralty are *sui generis* and controlled by the maritime law, save in case of death, wherein the states, by legislative enactment, have created liens and rights of action which are not inconsistent with the maritime law.'

And in fact, whether intentional or otherwise, the Ohio Compensation Act does not purport to exempt from liability in admiralty, nor does it employ general terms in providing for immunity, but provides only against liability for "damages at common law or by statute."

As admiralty would have jurisdiction over every injury to a seaman on shipboard, there would be practically no case where the exemption of liability given by the statute would have any value. *The maritime employer would pay his premiums for nothing.*

This feature of the situation has been referred to in three recent cases:

> *Murray vs. Pacific Coast S. S. Co.,* 207 Fed. 688,
> *State ex rel. Jarvix vs. Doggett,* 87 Wash., 253,
> *Walker vs. Clyde S. S. Co.,* 215 N. Y., 529,

the first two cases dealing with the Washington Compensation Act, and the last case with that of New York, both acts creating State Insurance Funds. In the District Court case, the question is left undecided (page 692):

"It is argued that the plaintiff might sue in the common-law courts or in admiralty, and that as the State Legislature could not curtail the admiralty jurisdiction by abolishing a cause of action of which the admiralty court has jurisdiction, if the defendant paid the tax to the state, the plaintiff could still have gone into the admiralty court to recover for his injuries, and that its payment of the tax would not have shielded the defendant from liability.

The question argued is an interesting one, but its decision is not required herein."

The Supreme Court of Washington, however, was constrained to construe the Act as not applying to maritime employers (page 257):

"The maritime law being a part of the law of the United States, the legislature of a state has no power to modify or abrogate it. *Workman vs. New York City*, 179 U. S., 552. It follows, therefore, that the legislature in passing the Compensation Act could not take from a workman any right which he had under the maritime law of the United States. The petitioner here still has the right to pursue his remedy in admiralty. Gathering the purposes of the act from all its provisions, we think it could not have been the legislative intention to encroach upon the admiralty jurisdiction of the Federal Court. * * * If companies operating boats upon Puget Sound are within the act, then they may be compelled to pay the percentage of their pay rolls specified, and yet be subject to a right of action in admiralty; while other persons or corporations engaged in a hazardous business not covered by admiralty law would be completely protected against the pursuit of any other remedy or proceeding. The owner of a steamboat, if he should pay the percentage of his pay roll specified, and his injured seamen should pursue their remedy in admiralty, would receive no protection from the act, and yet would be subject to its burdens. If the act were given this construction, it might well be doubted whether it would not offend against that provision of the fourteenth amendment to the Constitution of the United States which provides that no state shall make or enforce any law which shall 'deny to any person within its jurisdiction the equal protection of the laws.' "

The New York Court of Appeals came to the contrary conclusion, stating as to maritime employers (page 532):

> "But it is argued that the act purports to grant exemption from further liability to those who comply with it, and that as such exemption is not effectual in the case of employers whose property may be proceeded against in admiralty, it is as to them a denial of the equal protection of the laws. The exemption, however, is from suits at common law, of which all employers complying with the act equally have the benefit. If another remedy remain, it results from the nature of the case, and not from any attempt at discrimination on the part of the legislature. All in the same case are treated alike. Employers in the situation of the appellant are subjected to two remedies now, precisely as they were before the passage of the act. A new remedy has been substituted for the common-law remedy, from which the employer is granted exemption;"

and that:

> "If in certain cases a remedy in admiralty still exists, that results from the dual nature of our government—from the existence of two jurisdictions within the same territorial limits—and is a part of the price which persons thus affected have to pay for the privilege of enjoying the advantages of that form of government."

The court is simply throwing up its hands at the inequalities and inconsistencies resulting from its decision.

If our dual governments were of equal sovereignty, the conclusion of the New York Court would be correct, but the very purpose of making the federal government paramount within its own jurisdiction, is to prevent just such results of the dual form of government.

We submit that the Washington case has the better reasoning, and that as the state laws are powerless to protect the maritime employer because of the maritime grant to the United States, that grant prevents the state

laws being applicable to maritime employers, and as to them the legislation does not fall within the saving clause.

It will doubtless be conceded that, given a federal Compensation Law applying to maritime employers, state legislation on the subject would be excluded. Technically it may be said that the obligation of the maritime law for cure and maintenance, and wages, does constitute a Compensation Law. This obligation is thus stated in *The Osceola,* at page 175:

> "That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued."

And in *The Santa Clara,* 206 Fed., 179:

> "The relation of seaman to ship-owners is peculiar. By the maritime law a seaman injured in the service of the ship is entitled to wages and maintenance and cost of cure, at least to the end of the voyage, without any reference whatever to the question of negligence, either upon his own part or upon that of his fellow servants, or upon that of the owners."

It will be noted, therefore, that this obligation is an anticipation of modern Workmen's Compensation. It contains the same essential elements: recognizes that the injuries are a risk of the employment and to be born by it, and that this is independent of negligence on either side. If Congress were to enact a complete modern Compensation Act, it would consist of these same provisions, and could only extend the period and amount of compensation and amplify the details.

While there has been no Congressional legislation on the subject of compensation applying to maritime commerce, or on the rules determining the employer's liability, there has been the legislation limiting that liability to the value of the steamer, when the negligence is

without privity or knowledge of the owner, which would include most negligence cases.

U. S. Rev. St., Sec. 4283.

It would seem that the obligation to pay the fixed sums specified by the Compensation Act, is necessarily inconsistent with the federal limitation of the liability. The Washington Supreme Court, in the case referred to above, proceeds to enforce this point:

> "The petitioner seeks to apply that rule of law which permits the state to legislate upon matters which are distinctly local in character, although embraced within the Federal authority, until such time as the Federal authority may be exercised by act of Congress. *Wilmington Transportation Co. vs. R. R. Commission of California*, 236 U. S., 151. Relying upon this rule, it is argued that, since Congress has passed no Workmen's Compensation Act which covers employes on board ships, the industrial insurance law applies until such time as a Federal act is passed. This position cannot be sustained. * * *
>
> By *U. S. Rev. Stat.*, Sec. 4283, the liability of the owner of any vessel for damages or injury which occur without the privity or knowledge of such owner, is limited to the 'amount or value of the interest of such owner in such vessel and her freight then pending.' By Sec. 4289, the limited liability provided for in Sec. 4283 is made to apply to owners of 'all sea-going vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, lighters, and barges.' The limited liability thus provided for by Congress applies to cases of personal injuries as well as to cases of loss of or injury to property. * * * It will thus be seen that Sec. 4283 of the Federal Statutes limits the liability of the owner of a vessel. This limited liability becomes the extent of recovery. Beyond the liability as limited by the statute, there can be no recovery. The Workmen's Compensation Act limits the amount for which an employer may become liable as specified in the act. The Congress of the United States having passed a law which limits or measures the extent of the liability of the owner of a vessel to a workman who has sustained an injury, the legisla-

ture would not have the power to fix another and different standard or measure. In *Sinnot vs. Davenport*, 63 U. S., 227, it was said: 'The whole commercial marine of the country is placed by the Constitution under the regulation of Congress, and all laws passed by that body in the regulation of navigation and trade, whether foreign or coastwise, is therefore but the exercise of an undisputed power. When, therefore, an act of the Legislature of a State prescribes a regulation of the subject repugnant to and inconsistent with the regulation of Congress, the State Law must give way; and this, without regard to the source of power whence the State Legislature derived its enactment.' The writ will be denied."

In any event, this federal statute makes it possible in practically every negligence case, even where action has been begun in the state court, to bring the adjudication of liability into the admiralty court, where the rules of the maritime law will be applied. The application of neither state compensation or liability laws to maritime employment can be maintained, when there is such federal machinery enforcing the supremacy of the maritime law.

It may well be doubted whether a Compensation Act, and particularly a scheme of State Insurance, is a "common-law remedy" which is saved to suitors, or anything that the common law has been or is competent to give. The common law referred to in the saving clause enacted by Congress shortly after the Constitution, must refer to the same common law referred to in the Constitution, as to which we may paraphrase the language of *The Lottawanna*, and say that "the general system of common law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared" that a common law remedy should be saved to suitors.

It is true that this common law was a living body of law, subject to growth and development. Yet it must be

that the *genus* common law, as then existing, was referred to, and that it is only the various *species* thereunder that may be increased and varied. Thus the common law recognized liens, and therefore the saving clause would include the various new liens that might be created in the future; it recognized seizure of property by judicial process, so that the saving clause would include new methods of attachment, sequestration, etc.; and especially it recognized action in court, so that all the subsequent variations in the form of action would be included.

This included the right of the state to legislate along these lines, although creating new rights and remedies incidentally affecting maritime matters. But as stated by this Court:

> "It could not have been the intention of Congress, by the exception in that section, to give the suitor all such remedies as might afterwards be enacted by state statutes, for this would have enabled the states to make the jurisdiction of their courts concurrent in all cases, by simply providing a statutory remedy for all cases. Thus the exclusive jurisdiction of the federal courts would be defeated."
>
> *Hine vs. Trevor*, 4 Wall., 555, 571.

But the payment by an employer to an employe where there is no legal liability, was an idea entirely foreign to common-law principles; it is not a development of the common law, but as adopted in modern legislation is a social and not a legal product. Indeed, we believe that the only occurrence of the idea in our jurisprudence was the cure and maintenance obligation of the maritime employer, so that so far from this being a common-law remedy, it was a peculiar feature of the admiralty.

Still less is contribution to a State Insurance Fund, with distribution of the fund by an administrative board, a common-law remedy, whether judged by the jurisprudence of our forefathers or by modern standards. This

seems self-evident; but if any further demonstration were needed it is to be found in the fact that a constitutional amendment was necessary in Ohio before the Compensation Act was made compulsory.

The Compensation Act, even more than a Liability Act, trenches upon the uniformity of the national maritime law and produces inconsistencies and inconvenience, particularly in view of the fact that most maritime commerce, and practically all on the Great Lakes, is interstate.

The owner in this case is an Ohio corporation, but its steamer may never come within the State of Ohio. The seamen may be citizens of other states, and never be within Ohio during the sailing season, or if they are, they are here today and gone tomorrow. If they and their steamer come to an Ohio port again, it is only as the chances of trade may bring them, and nothing can be conceived more irregular than the coming and going of a lake freighter within the State of Ohio. The lake steamers only navigate about seven months a year, and if the steamer came to an Ohio port every trip, she would be in Ohio only fifteen times during the year, this being the average number of trips, and then for only a day or so at a time. It would be hard to conceive of a more discriminatory act, than to make a ship, which may be in Ohio only once, and which is in Ohio only about fifteen days in the season at the best, pay into the Ohio Insurance Fund, and on the same basis as land employers.

Besides this, the owner would have to comply with the Act of every other state on the Great Lakes, unless this can be avoided by the doctrine of the extra-territorial operation of the State law.

If the owner must comply with all the laws, the confusion that would result is manifest. A steamer may be owned in Ohio and in her regular voyages on the Great

Lakes may and must go into and remain in other states just as much as in Ohio. Nearly all the Lake States now have Compensation Laws, and they are all different; and even if they were all identical with Ohio it would involve the owner taking notice at his peril of the laws of the various states, and becoming a contributor to the several different insurance funds; whereas he should have "a right to suppose that the general maritime law applies to him and his ship, wherever she may go, unhampered by laws which are mainly intended for local application, or for domestic ships." (*The Roanoke,* 189 U. S., 185, 195.)

If, on the other hand, the doctrine of exterritoriality is to apply, a steamer owned by an Ohio owner would have to comply, but one owned by an owner in a jurisdiction where there was no such Act could engage in the same trade and carry the same class of men, employed in the same places, in the same manner, at the very same service, and would not have the burden of contributing to the Ohio Insurance Fund, and would not be deprived of its common-law defenses.

Nor does the confusion of the extraterritorial notion end here, for several people often own undivided interests in the same ship, and may do so up to as high a fraction as a sixty-fourth. It may very well happen, therefore, that a steamer might be owned by say eight different owners, residing one in each of the eight states bordering the Great Lakes. Which territoriality would she carry? Also, a ship does not have to be owned by a resident or citizen of a Lake State. There might be a part owner in any number of different states or in all the states of the Union, some of which are entirely interior and border on no navigable water. Which Act would control? If it be claimed that the residence of the principal or managing owner would control, such principal or managing owner might be a citizen of some interior

state not touching any navigable water, and into which the ship herself would never come.

On the other hand if we turn to the seaman and consider his rights, we have confusion worse confounded. Seamen are proverbially peripatetic. They are on one ship today and another tomorrow. If each particular statute has to be complied with, his rights are one thing one minute and another thing the next minute. As his ship crosses a jurisdictional line or if his six hundred foot ship lies across such a line, it might be one thing in one end of a ship and another thing in the other end for the same character of injury and under the same circumstances. Or if the doctrine of state territoriality of the owner is to apply, he might be in one ship in the forenoon and another in the afternoon in the same harbor or lying at the same dock, and his rights would be one thing in the forenoon and another in the afternoon. Or suppose a dozen of the modern steamers with managing owners or corporations belonging to as many different states should be lying at the same dock, and a seaman is injured under the same circumstances, such as falling into the hold on each of these steamers. Each one of these twelve seamen would have different rights, although all were serving under similar maritime contracts, signing identical shipping articles covering the same waters, on ships enrolled and licensed by the United States for exactly similar services, and navigating the same public, navigable waters of the United States.

While we have for the moment assumed extra territorially as an alternative, we do not believe that the doctrine can stand. It means that the laws of some one state, as to the particular employer, are to be paramount in the other states and over their local laws. Our scheme of government affords no basis for this, but in those cases where such supremacy is necessary, lodges it, not in any

state, but in the federal government. Maritime and interstate commerce does require uniformity and supremacy of one law; and the doctrine of state extra territoriality is simply a recognition of this and an attempt to accomplish the result by an unconstitutional method.

The constitutional method consists in applying the uniform national maritime law, defining the mutual rights and obligations of owner and seaman wherever they may go upon the navigable waters of the United States. To maintain this unimpaired, was the purpose of the maritime grant in the Constitution, and we submit that it is violated by a State Compensation Law that is construed as applying to the maritime employment.

III.

INTERSTATE COMMERCE.

The relation of the interstate commerce clause to state legislation effective on the water, has long since been stated in *Sherlock vs. Alling,* 93 U. S., 99, and the whole question recently discussed in *The Minnesota Rate Cases,* 230 U. S., 352, 398-412, and it does not seem necessary to multiply authorities.

There is no doubt that the state, under its police power, may enact Employer's Liability Acts (as distinguished from Compensation Acts), so far as the interstate commerce clause is concerned, unless and until there is a federal law on the subject. Our position is that as to *maritime* interstate commerce, the distinctive rules of the maritime law constitute such a federal law, as to maritime employers, the same as the statutory Railroad Employer's Liability Act does now as to railroad carriers; and that the interstate commerce clause, as well as the maritime clause of the Constitution, may

be invoked to prevent state legislation as to maritime employers engaged in interstate commerce.

As to Compensation Acts, particularly those providing for payment into a State Insurance Fund, we doubt the competency of the State to apply them to interstate commerce at all, whether on land or water. We, however, do not need to argue the question so broadly; as the distinctive features of *maritime* interstate commerce at least must render such laws void as to employers engaged therein.

In the discussion of Compensation Acts, with reference to the maritime law, in which it was noted that maritime commerce on the Great Lakes, at least, was for the most part also interstate, we have already pointed out the results of attempting to apply Compensation Acts to maritime interstate commerce; that either it involves the carrier complying with the Compensation Acts and contributing to the insurance funds of all the several Lake States, or giving extra territorial effect to the Compensation Act of some one state, which in itself could only be done as a regulation of maritime or interstate commerce by the federal government itself; and that whichever horn of the dilemma we adopt, manifest confusion, inconvenience and hardship would result. We will not repeat the discussion under the present head, but simply note that it authorizes appeal to the interstate commerce as well as the maritime clauses of the Constitution.

It must be manifest that to require a person engaged in interstate commerce, and especially a maritime carrier, to pay premiums into a State Insurance Fund, operates as a regulation of, and a direct burden upon such interstate commerce.

Whether we have regard to Employer's Acts or Compensation Acts, there is the fundamental legal difference between commerce on land and water already

discussed, in that the former is governed by no law except that of the States, until Congress legislates, whereas on water there is the maritime law constituting a federal common law prior to and independent of any Congressional legislation. In addition, however, there is a manifest physical difference in this connection between land and water, which justifies and explains the legal difference. While land carriers, it is true, operate interstate trains, yet their tracks and buildings are permanently within the state, and a large amount of rolling stock is also there, although the individual items thereof may be fluctuating and passing back and forth between the states. Whereas the steamer of the maritime carrier is a complete and independent unit, going from state to state, unrelated to the land or anything thereon, spending most of its time far beyond the local harbors, and only within the state at any time by virtue of the fiction or arbitrary rule of law that extends the state line out into the water.

It is also significant that the federal government has not jurisdiction over the land as a territorial matter, but only over the commerce itself and the particular highway over which it moves. Whereas the federal government has paramount jurisdiction over the navigable waters, as such, and every part thereof, from the international boundary line to the farthest point within the state on its navigable rivers; by virtue of which the federal government makes improvements, fixes harbor lines, prescribes rules of navigation, and enacts the criminal laws.

So that it is entirely to be expected, that the federal jurisdiction excludes state legislation on employer's liability from maritime interstate commerce, whether or not it does from interstate commerce on land.

The Ohio Compensation Act confessedly could not be applied as against interstate railroad carriers, and yet no such exception is made. When the Act came to be amended later (Act of 1913, page 72), so as to make

it compulsory, by virtue of the Constitutional amendment, it was provided that the Act should apply to employers and employes engaged in interstate commerce for whom a rule of liability or method of compensation has been or may be established by Congress, only to the extent that their mutual connection with intrastate work, can be clearly separated and distinguished from interstate commerce, and then only by mutual agreement (Section 51). A similar exception, by implication, must be read into the original Act covering railroad employers, by virtue of the Act of Congress defining their liability; and our position is that a similar exception must be read into the Act as to maritime employers engaged in interstate commerce, because their liability is defined by the federal maritime law adopted and made paramount by the Constitution.

The foregoing discussion applies also to the case of *The Valley Steamship Company vs. Mraz,* Number 470, in which by order of this court the same judgment is to be entered as in this case; and for the reasons set forth in this brief, we respectfully submit that the judgment of the Ohio Court of Appeals in both cases should be reversed, and the judgment of this Court entered for plaintiff in error.

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Of Counsel.

Cleveland, Ohio, December 30, 1916.

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JAN 9 1917
JAMES D. MAHER
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In the Supreme Court of the United States

OCTOBER TERM, 1916.

No. 469

THE VALLEY STEAMSHIP COMPANY,
Plaintiff in Error,
vs.
JOHN J. WATTAWA,
Defendant in Error.

AND

No. 470

THE VALLEY STEAMSHIP COMPANY,
Plaintiff in Error,
vs.
JOSEPH WRAY,
Defendant in Error.

BRIEF FOR DEFENDANTS IN ERROR.

GEORGE E. [illegible],
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In the Supreme Court of the United States

OCTOBER TERM, 1916.

No. 459

THE VALLEY STEAMSHIP COMPANY,
Plaintiff in Error,

vs.

JOHN J. WATTAWA,
Defendant in Error,

AND

No. 470

THE VALLEY STEAMSHIP COMPANY,
Plaintiff in Error,

vs.

JOSEPH MRAZ,
Defendant in Error.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF FACTS.

The plaintiff in error has filed a petition in error in this court to the District Court of Appeals for the Eighth Circuit of Ohio. These cases were previously before this court on petition in error from the Supreme Court of Ohio and were dismissed upon motion.

The defendants in error were inexperienced deck hands employed on the Steamer "Edwin N. Ohl" registered from an Ohio port and owned by an Ohio corporation, and lying at the port of Sandusky, Ohio, in September, 1913, when the injuries for which recovery is sought were suffered.

The two cases were tried separately, but the facts in each of them were practically the same. The Wattawa case was tried in the January term of court, 1914. The case was predicated upon the fact that the injured boy left the boat about dusk while the boat was lying at a slip in the Sandusky Harbor, the collapsible steel hatches on the deck all being closed. He returned to the deck about an hour later and while passing with his companion to his quarters aft both fell into an open hatchway which had in the meantime *been opened on the direct orders of the master of the vessel,* and which the evidence tended to show had been left unlighted and unguarded. His action for damages resulted in a verdict of $5500, the evidence showing that he was seriously and permanently crippled. The record discloses that the negligent acts complained of were all done in pursuance of the direct orders of the master of the vessel.

The verdict was affirmed by the District Court of Appeals for the Eighth District of Ohio December 24, 1914. Over a year and a half later application was made to this court for a writ of error to the District Court of Appeals of Ohio. **No effort was made until that time to remove the case to a Federal Court nor was any effort made by the plaintiff in error to apply any admiralty rule of recovery, upon which it now insists, nor was any proffer made of the relief which plaintiff in error now claims the admiralty affords. The case was tried according to the rules of the common law and the pleadings will disclose that plaintiff in error denied the right of the plaintiff below to any relief asserting as defenses the doctrine of assumption of risk and contributory negligence.**

ARGUMENT.

The controlling facts in this case are not disputed. The defendant was an Ohio corporation with headquarters at Cleveland, Ohio. *The steamer on which the accident occurred was enrolled and licensed from an Ohio port. At the time the accident occurred the vessel was lying at Sandusky Harbor within the body of Erie County, Ohio. The negligence complained of was that of the captain of the vessel. The action was begun against the owner of the vessel to fix the common law liability, and no attempt was made to invoke admiralty relief or to resort to any admiralty procedure. The action was purely a common law action by an employee to recover compensation for his injuries from his employer. The employer interposed his common law defense. The case was tried according to the common law rules of procedure. The rights and duties of the parties were determined by the common law of Ohio as modified by statute and the common law remedy was applied. The entire proceeding was altogether right or altogether wrong, and if the latter is true it must be because the courts of Ohio were without jurisdiction to hear the controversy or if they might have heard it they could determine it only by applying admiralty rules and disregarding entirely the common and statute law of the state.*

Many of the questions arising in this case were raised and argued in the case of Schwede vs. The Zenith Steamship Company now before this Court and set for argument in this case These questions were then ably discussed in the briefs filed by plaintiff in error which we heartily endorse and adopt.

We cite these briefs for the Court's consideration because we wish to avoid as far as possible duplication of the citations and arguments contained therein. We desire to confine ourselves to a consideration of certain points peculiar to this case—a reference to the laws

of Ohio applicable to it, and some of the more peculiar features of the argument of plaintiff in error.

Without undertaking to discuss or distinguish the vast number of citations and quotations with which plaintiff in error has ladened his brief we beg leave to direct this Court's attention to the particular questions in this case, the fact that no Federal or admiralty question was saved in the record and the gross inconsistencies in plaintiff in error's argument and conclusions.

The position taken by the plaintiff in error before this Court is summarized in its third paragraph of assignments of error quoted in its brief. Their contention is that it was erroneous for a court of Ohio to hold that the right of recovery of plaintiff in the action there pending could be determined by the common or statute law of the State of Ohio. This was the only law that the common law courts of Ohio could administer. Their claim amounts to a virtual denial of the right of the plaintiff to assert his right of action in the state court. In other words it amounts to the assertion that a man seeking employment of a vessel company forfeits his right to resort to the courts of his state for the redress of grievances of this character, and that the owner of the ship is not amenable to the ordinary rules of law governing the relation of master and servant.

We ask the Court to note that the denial of jurisdiction of the state courts is taken by the plaintiff in error in this Court for the first time in this action. The record will disclose that the defendant made no effort to remove this case to the Federal Court nor did it make any tender in the state court to the relief that it now asserts the admiralty law affords. Instead of this the plaintiff in error entered its appearance in the state court and denied the right of any relief on the part of the plaintiff in error on the ground that there was a defense at common law. It was not denied in the proceedings throughout the state

court that the common law was competent to give a remedy provided the facts claimed by plaintiff were true. The sole contention in the case was that under the facts as claimed by defendant below the plaintiff was not entitled to this remedy. It was on account of the failure of this defense in the courts of Ohio that the plaintiff in error here changes its theory of defense and claims that plaintiff would have no right of recovery on account of an admiralty rule limiting the right of recovery of injured seamen to maintenance and cure.

On the second page of their brief they claim that final judgment should be entered in this Court in favor of the plaintiff in error notwithstanding the fact that the record discloses that the plaintiff in error failed to give or even tender the admiralty relief to which they claim the injured man was entitled. Much of the argument of the plaintiff in error is inclined to the inapplicability of the Workmen's Compensation Act of Ohio to the owners of vessels. It will be noted this act provides for a compensation fund which shall be contributed to voluntarily by employers of labor in this state. The only part of the act which in any way affects this case was that the legislature of the state abolished the defenses of assumption of risk, contributory negligence and fellow servant as to those employers which do not contribute to this fund.

The defendant company in the case was an Ohio corporation created by the statutes of Ohio. It was admittedly employing more than five workmen and admittedly was not contributing to this insurance fund. It was also admitted that the plaintiff in the this case was in the employ of the defendant company on one of its steamers which was then lying at the port of Sandusky, Ohio. Could the trial court under these circumstances have held that the doctrine of assumption of risk and contributory negligence was still a part of the common law of Ohio, or was it not obliged to apply the common law of the

state with its modifications at the time this action was tried. The Court of Appeals of Ohio being the highest court of the state to hear and determine this controversy disposed of this matter by deciding the case at bar as follows:

> "It has many times been decided by the Supreme Court of this state, by the federal courts and by this Court that a state statute regulating the relative rights and duties of persons within the state, and providing for their safety, will be enforced by both the state and federal courts, in cases of which they have jurisdiction. Such state statutes, though they affect persons engaged in interstate commerce, are inapplicable only when they conflict with federal statutes upon the same subject."

The Workmen's Compensation Act referred to was the act contained in Volume 1 of Page and Adams Anno. Gen. Code of Ohio, Section 1465 et. seq. which case was considered and upheld in this Court in the case of *Jeffery Mfg. Co. vs. Blagg*, 235 U. S., 571. This act provided for a liability fund to be contributed to by all the employers of labor, of five or more workmen, in Ohio. Under the terms of this act it was the option with any employer whether a contribution should be made to the fund. It was provided, however, that in the event any employer did not contribute to this fund and his employees were injured through any negligence, such employer could not avail himself of the following common law defenses:

> "The defense of the fellow servant rule, the defense of assumption of risk, or the defense of contributory negligence." (1465-60.)

We do not think it necessary to argue to this Court that the defense of fellow servant, assumption of risk and contributory negligence are purely common law defenses that were built up from time to time by the decisions of the courts of this country and of England. There is nothing sacred about these defenses and the

courts of Ohio might at any time have nullified them by refusing to accept the doctrine upon which they were founded, and for the same reason the state might well by its other mouth-piece, the legislature, have removed such defenses from the law. In fact this the legislature in plain terms did and this Court could not say that the state was not within its right in so doing. This company admittedly by the pleadings had not availed itself of the compensation fund and therefore as to them the act was a nullity except that the court refused it the right to assert the defenses of assumption of risk or fellow servant.

The question of the authority of the state to abolish altogether the artificial rules of assumption of risk and contributory negligence in an action arising in state courts is discussed in the case of *Erie Railroad vs. White* 187 Federal, 256, (6 C. C. A. 1911). This holds that the Ohio act of February 28, 1908, should be applied in the United States court. On page 558 the court says:

> "No reason is assigned and we observe none why this statute does not in cases to which it refers abolish entirely the defense of assumption of risk and abolish also the defense of contributory negligence as an absolute and variable defense, at bar, substituting therefore the rule of comparative negligence, nor why the substantive law of Ohio thus established should not be applied in the Federal Court."

Justice Day in deciding *The Jeffrey Mfg. Co.* case above referred to states:

> "Those remaining out and who might come in because of the number employed are deprived of certain defenses which the law might abolish as to all if it was seen fit to do so * * *.
>
> We are not prepared to say that this act of the legislature, in bringing within its terms all establishments having five or more employes, including the deprivation of the defense of contributory negligence where such establishments neglect to take the benefit of the law * * * justifies a court in declaring this legislation unconstitutional."

The courts of Ohio in applying the common law to this case were obliged to give application to all acts of the legislature of a constitutional nature bearing upon the case. A denial of this right would create infinite confusion and would nullify the saving clause of the 9th section of the Judiciary Act of 1789. The provisions of this judiciary act as codified in the Judicial Code of 1911, Section 24, provides as follows:

> "The district court shall have original jurisdiction, * * * third, of all civil actions of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it."

Was this saving clause which has survived during almost the entire life of the government an empty phrase or should it be given meaning? Is there any remedy involved in this action which the common law is incompetent to give? If so in what way does this incompetency arise?

Before the bar of the state court the parties appeared as employer and employee. A great volume of decisions and statutory law making up the common law as applied in the state of Ohio fixed the rights and duties of the parties, and the procedure for redressing wrongs. This law was the only law which the courts of Ohio could have applied to the facts before it, and indeed a federal court sitting in Ohio would in a common law action have been obliged to apply the same rules of procedure to the facts before it. (Revised Statutes of the U. S., Section 721, 1901), except where the Constitution, treaties or statutes of the United States otherwise require. We look in vain for any constitution, treaty or statute of the United States which would conflict in any way with the administration of the law of the state in an action of this character. We also look in vain in a great body of federal decisions and rules of this court for a denial of the right of a state court to entertain an action in personam

against the owner of a vessel. On the other hand we find a long line of decisions following the decision of the *Steamboat Company vs. Chase,* 16 Wallace, 522, upholding the right of states to entertain actions in personam and upholding the remedy there administered, and yet we find the plaintiff in error appearing here to ask this Court to take away from the defendant in error the right to a common law remedy in this case, and by so doing to deny to any suitor the right to assert the common law remedy against the owner of a vessel if his claim arise from a tort.

There is only one ground upon which it could ask you to deny the common law remedy to suitors and that is because the common law is incompetent to give this remedy, and yet we find it appealing from the decision awarding compensation against the owner of a vessel which is the only remedy which could be given in any court and under any system of procedure in a proceeding where no maritime lien was asserted or no interference was attempted with any of the rules or practices of admiralty. When it is argued that relief should be given against this remedy afforded in this case to the defendant in error in common law on the ground that the common law was incompetent to give the remedy the argument vanishes in absurdity.

It is doubtless not disputed, nor could it well be by the plaintiff in error that had the injury suffered by defendant in error instead of mutilating him had killed him his dependents might have maintained an action in common law for compensation and the common law would have been entirely competent to have afforded such a remedy. Any question on this score is settled by the decision of this Court in *Steamboat Company vs. Chase,* 16 Wallace, 522, in which Justice Clifford says in his opinion:

> "Questions of the kind cannot arise in suits *in rem* to enforce maritime liens, as the common law is not competent to give such a remedy, and the jurisdiction of the admiralty courts in such cases is exclusive. Such a question can only arise in personal suits where the remedy, in the two jurisdictions, is without any substantial difference. Examined carefully it is evident that Congress intended by that provision to allow the party to seek redress in the admiralty if he saw fit to do so, but not to make it compulsory in any case where the common law is competent to give him a remedy. Properly construed a party under that provision may proceed *in rem* in the admiralty if a maritime lien arises or he may bring suit *in personam* in the same jurisdiction or he may elect not to go into admiralty at all, and may resort to his common law remedy in the state court, or in the Circuit Court of the United States if he can make proper parties to give the Circuit Court jurisdiction of this case."

It will be noted that this was an action for damages brought in the state courts of Rhode Island against the owner of the steamer for wrongful death. The view is taken by plaintiff in error that because death ensued as a result of the injury that the statute of Rhode Island was given application as fixing the remedy, and yet it is interesting to note that the statute of Rhode Island expressly states that an action for wrongful death might only be maintained where the death occurred under such circumstances that "had death not ensued an action might have been maintained *at common law.*"

The proposition that although an action could not have been maintained at common law had the injured man survived, notwithstanding on account of his death an action might have been maintained on his behalf to recover for the same injury seems to be trifling with our logical faculties as well as the spirit and letter of the law.

In this connection it is argued that the death statute should be recognized where fatal injuries occur on a steamer because the state statute affords a remedy and

that there is no admiralty rule on the subject. On the other hand where the injury does not result fatally no state statute should be considered because there is an admiralty law limiting mariners in proceedings *in rem* against the vessel to the right of maintenance and cure. We are puzzled with this argument in the same manner that the Circuit Court of Appeals was puzzled in *Zenith Steamship Company vs. Schwede.*

The admiralty law gives no right of recovery for wrongfully causing death. (*The Harrisburg,* 119 U. S., 199.) This certainly is as much a law upon the subject as if the law did give a right of recovery. It is hard to perceive any distinction between a law denying any remedy under certain circumstances and a law affording a remedy. An admiralty law which denies to suitors the right to compensation where death does not ensue is certainly not more strongly fixed in principle than an admiralty rule denying to beneficiaries any remedy where the accident results fatally. We presume on the same theory that the admiralty by right of maintenance and cure is a complete and exclusive code. Plaintiff in error would argue that had any Admiralty Court directed that a dead seaman be given burial it would thereby have nullified State Death Statutes.

The sole reason for the distinction in the argument of the plaintiff in error is that the admiralty rule forbidding recovery of compensation for personal injuries was accepted by the constitution in the grant of Federal power, but that the admiralty rule denying survivorship of the right of action was not accepted. If the constitutional grant of power accepted admiralty rules of decision as a code of rights and remedies it is hard to see how even the Federal Congress would have a right to alter or modify it, and the saving clause in the judiciary act could go no further than to permit a state court to act if invoked as an administrative adjunct to courts of admir-

alty administering admiralty remedies according to the rules and practices of admiralty untarnished in either injury or death cases by state interference. (And if plaintiff in error adheres to this argument to the extent of being consistent, it thus denies the right of Federal interference.)

It needs but a brief survey to see that this position is unwarranted by history, logic or precedent.

Complaining of the confusion that would result from applying the substantive and remedial laws of the several states on account of the variations, conceding that Congress has not acted to remedy such confusion by passing a law that would be a uniform rule or decision in all cases; knowing (as it must be admitted) that Congress has full authority to legislate on the subject, plaintiff in error seeks to supply such missing legislation by the theory that the constitution adopted as the basic law of the land the vast number of admiralty decisions, foreign and domestic, as they stood written in 1789.

The most amazing thing about this theory is that the trial court in the *Schwede* case accepted it. If the theory were correct then all the admiralty decisions as they existed in 1789 would amount to constitutional provisions on all subjects of admiralty jurisdiction, and Congress would be powerless to change or repeal them. This is logically pointed out by this Court in the leading case of *Wareing vs. Clark*, 5 Howard, 441, on page 457. Another amazing feature of this theory is that the English admiralty law of that day was the law of the high seas and expressly excluded courts of admiralty from jurisdiction where the controversy arose on a ship within the harbors or territorial waters of England. *In Wareing vs. Clark* the question discussed and decided was not whether the common law courts would have jurisdiction to hear and determine a case arising on the Mississippi River, 90 miles from the sea, as that was conceded, but whether

courts of admiralty would have concurrent jurisdiction, and it was held that while the jurisdiction of common law courts in such cases would be exclusive in England, the court might extend the operation of the admiralty law to inland waters and make it concurrent with the common law jurisdiction—a fatal blow to the theory in question.

In laying this theory away it is interesting to note the strangest plea made for its acceptance—the plea that carried great weight with the trial court in the *Schwede* case—the plea that the law of the place where the accident occurred must be disregarded in the interest of uniformity.

Before Congress saw fit to act with reference to railroads the train crew might in the course of a day have passed through a number of jurisdictions, and have had their rights in a case of tort defined by the locality of its occurrence. The rights of the several states to have different rules of relief was not questioned, and yet the trial judge finds in the *Schwede* case that it would be "inconvenient," "unjust" and "absurd" that seamen be given different rights in different ports that their ship might visit and therefore all state laws should be disregarded and in the interest of uniformity seamen should be given in case of wrongful injury only maintenance and cure so long as the voyage they were on should last.

In other words the thought is that because the old law of the high sea might say to the owner of a sailing vessel outward bound from New York for a trading trip to the China coast, that if any of the sailors should be injured or fall sick on a trip they must be cared for and brought safe home, that therefore in the interest of uniformity the law should also say to the owner of a New York river ferry "if you injure any of your employees on the boat no matter how gross your fault your full duty is done

when you bring the boat to shore, and the legislature and courts of New York are powerless to reach you."

As we have stated above the theory has neither logic nor facts to support it.

It is necessarily admitted by all parties that Congress has never acted with reference to the question of the right of a seaman to recover for his personal injuries. In view of this fact it need not be argued by us whether Congress would have power by suitable legislation to legislate on this subject and in so doing provide an exclusive remedy. As Justice Holmes has stated in the case of *The Hamilton*, 207 U. S., 404, whatever views there may be on this subject such views need not be serious in view of the fact that Congress has remained silent. If the opinion in the *Hamilton* case is still the opinion of this court, then it is certain that until Congress acts on this subject the state may legislate in regard to the duties and liability of its citizens and corporations within its own territorial waters.

Justice Holmes in this latter case states that the saving clause of the judiciary act "leaves open the common law jurisdiction of the state courts over torts committed at sea. This we believe always has been admitted, * * * and as the state courts in their decisions can follow their own notions about the law and might change them from time to time, it would be strange if the state might not make changes by its other mouth piece, the legislature."

This language is particularly apt in disposing of the argument that the state of Ohio might not abolish by statute purely arbitrary defenses of fellow servant and contributory negligence as it did do in the act complained of.

As we have stated the highest courts of Ohio have held that in this case these arbitrary defenses might not be availed of. In the case of *Knapp vs. McCaffery*, 177 U. S., 638, this Court held that the right to a common law

remedy gave the plaintiff the right to give the substantive law of Illinois application to the adjudication of his claim, the Court saying:

> "But whatever might be our opinion on the subject the Supreme Court of Illinois having held that under the laws of that state the plaintiff had a possessory lien upon this raft * * * we should defer to the opinion of that court in these particulars, as they are local questions dependent upon the law of the particular state."

Counsel for plaintiff in error insists that the *Osceola* case, (189 U. S., 158) has some deciding effect in this case. We insist that the *Osceola* case should be given no wider application than the opinion indicates. Justice Brown in the preface to his decision states as follows:

> "As this is a libel *in rem* it is unnecessary to determine whether the owners would be liable to an action *in personam* either in admiralty or common law, although cases on this subject are not wholly irrelevant."

He then proceeded to point out that the admiralty law gave no right of recovery in that case in a proceeding *in rem* beyond maintenance and cure.

The other question which is certified to the court as to the application of the Wisconsin statute was answered in the negative. In this case he does not decide that the statute of Wisconsin could not give a lien on a vessel in a proceeding *in rem* for personal injuries received by seamen, but he decided from an analysis of the language of the statute that it did not give such a remedy. The Wisconsin statute gave a lien "for all damages arising from injuries done to persons or property by such ship, boat or vessel."

It will be noted the court carefully analyzed the question whether an injury done to a seaman on board the vessel was within the purview of this statute and he emphasizes the opinion that,—"the vital question in the case is whether the damages arose over an injury done to

persons or property by such ship, boat or vessel," and holds as a matter of law that the injury received by the employee upon board of the vessel was not such an injury as was contemplated by the statute and therefore the statute should not be given application. The very fact of its analyzing the language of the statute indicates the view that had the statute extended its operation to cases of damages done on board the ship the statute should be given full application.

The corresponding statute in Ohio in force at the time this accident occurred was not limited in its application in the manner indicated. Section 12088 Page and Adams Anno. Ohio Gen. Code, Vol. 5, provides "that any steamship, boat or other water craft navigating waters within or bordering upon this state shall be liable, and said liability shall be a lien thereon * * * for injuries done to persons or property by such craft or for any damages or injury done by the captain, mate or other officer thereof, or by any person under the orders of sanction of either of them, or to any person who is a passenger on or employee of said steamboat or other water craft at the time of the infliction of such damages or injury." It is hard to believe that had Justice Brown had the Ohio statute instead of the Wisconsin statute before him his decision in the Osceola case would not have been different, as the reasoning of the case leaves no other inference even though this had been a proceeding *in rem* in an admiralty court.

However, as this is purely an action *in personam* against the owner of the vessel at common law it was such an action as was expressly excluded from the consideration of the court in the Osceola case.

There are three vital questions in this case the answers to which questions would dispose of this proceeding.

FIRST: HAS A SEAMAN IN THE EMPLOY OF A VESSEL COMPANY A RIGHT TO SUE HIS EMPLOYER IN A STATE COURT EITHER IN CONTRACT OR TORT UPON CAUSES OF ACTION ARISING UPON THE TERRITORIAL WATERS OF THE STATE?

If the seaman has not a right to sue in a state court then the clause saving to him his common law remedies would not mean more than that he must sue the vessel owner in a court of admiralty and have that court administer his common law remedy. As this is obviously not what was meant by the saving clause it must therefore follow that if the clause meant anything whatever it permitted the seaman access to the courts of his state. If a seaman has not this right then this action was improperly brought but if the right exists then the action properly followed the forms of pleading and practice prescribed by the state of Ohio for bringing actions, and the next question which suggests itself is:

SECOND: SHOULD STATE COURTS SITTING TO DETERMINE CONTROVERSIES BETWEEN EMPLOYER AND EMPLOYEE DISREGARD THE COMMON AND STATUTORY LAW OF THE STATE IN ADMINISTERING REMEDIES, IF THE EMPLOYER WAS THE OWNER OF A MARITIME VESSEL AND THE EMPLOYER A SEAMAN THEREON?

If the court had a right to hear and determine the controversy, then should the courts of Ohio have disregarded the constitution and statutes of the state and administered and submitted to a jury whether the defendant was guilty of negligence through the acts of the captain in charge of the vessel or should the court have discharged the jury from

the consideration of the case and undertook to divide the damages suffered between the plaintiff and defendant, or have adjudged what was proper maintenance and cure to be given the plaintiff and directed the defendant to pay such sum. If the state court undertook to do this it would arrogate to itself the functions of a court of admiralty and in so doing act without the authority of either the state of Ohio or the Federal government. This quandary would leave the court but one course which it could pursue and that would be to dismiss the action, which would in effect deny to a suitor his common law remedy. This raises a third and supplementary question:

THIRD: WHERE BOTH THE EMPLOYER AND THE EMPLOYEE APPEAR IN A STATE COURT AND SET UP THEIR COMMON LAW ACTION AND DEFENSE, THE EMPLOYEE ASKING COMPENSATION FOR THE NEGLIGENCE OF THE EMPLOYER, AND THE EMPLOYER ASKING TO BE RELIEVED FROM ANY LIABILITY BY REASON OF THE CONTRIBUTORY NEGLIGENCE OF THE EMPLOYEE, SHOULD THE STATE COURT DISREGARD THE PRAYERS OF BOTH PARTIES AND OF ITS OWN MOTION ADMINISTER A REMEDY UNKNOWN TO THE COMMON LAW OF THE STATE?

This question may be supplemental to the other two but illustrates most pointedly the quandary in which an Ohio court would be put if it would have been obliged of its own motion to disregard not only the common and statutory law of the state of Ohio but the pleas of both the plaintiff and defendant. This it would have been obliged to do if plaintiff in error's theory is correct.

There is therefore only one logical conclusion to draw from plaintiff in error's argument and that is that the court of Ohio in this case should have dismissed the action for the reason that it was without jurisdiction. Such action would of course be unwarranted, but the court would then not have appeared so ridiculous as it would had it undertaken to discharge the jury from a consideration of the case and acted as trier of the facts as is the custom of courts of admiralty and administered a system of law foreign to its experience.

If the argument here had been urged in the state court and the court was in a dilemma as to whether to dismiss the suit or proceed to adjudicate it according to the pleas of the parties he would need only turn to the case of *Steamboat Company vs. Chase*, 16 Wallace, at page 532, to find this language:

> "A few observations will serve to show that the jurisdiction of the state courts is equally undeniable if it is determined that the case is within the jurisdiction of the admiralty courts. Much discussion of that topic cannot be necessary, as several decisions of this Court have established that rule as applicable in all cases where the action in the state court is in form a common law action against the person, without any of the ingredients of a proceeding *in rem* to enforce a maritime lien. * * * But when the suit is *in personam* against the owner, the party seeking redress may proceed by libel in the District Court, or he may, at his election, proceed in an action at law, either in the Circuit Court if he and the defendant are citizens of different states, or in a State Court as in other cases of actions cognizable in the State and Federal courts exercising jurisdiction in common-law cases, as provided in the eleventh section of the Judiciary Act. He may have an action at law, in the case supposed, either in the Circuit Court or in a State Court, because the common law in such a case is competent to give him a remedy, and wherever the common law in such a case is competent to give a party a remedy, the right to such a remedy is reserved and secured to suitors by the saving clause contained in the ninth section of the Judiciary Act."

The state court might have found on further examination that the decisions of this Court have uniformly upheld the jurisdiction of the state court. Obviously then he could not dismiss the action for want of jurisdiction.

Turning then to see by what system of pleading and procedure he should follow he might find that in the same case at page 534 Justice Clifford outlining the procedure says:

> "Different systems of pleading and modes of proceeding, and different rules of evidence prevail in the two jurisdictions, but whether the party elects to go into one or the other, he must conform to the system of pleading and to the rules of practice, and of evidence, which prevail in the chosen forum. State statutes, if applicable to the case, constitute the rules of decision in common-law actions, in the Circuit Courts as well as in the State Courts, * * *. State legislatures may regulate the practice, proceedings, and rules of evidence in their own courts, and those rules, under the 34th section of the Judiciary Act, become, in suits at common law, the rules of decision, where they apply, in the Circuit Courts. All these are familiar principles, and they are sufficient to dispose of the case."

The court would necessarily in pursuance of this doctrine follow the rules of practice and procedure outlined by the laws of Ohio and this he did. If he was in a quandary as to what substantive laws to apply he would find in the case of *Sherlock vs. Alling*, 93 U. S., 99, page 104, the statement that "the laws of the states govern and have obligatory force upon citizens within its jurisdiction whether on land or water or engaged in commerce, foreign or interstate, or in any other pursuit."

Further the state court would have looked in vain through the whole body of decisions of this Court to find any authority whereby he might have proceeded to disregard the substantive and the remedial laws of the state of Ohio and have proceeded to administer some remedy

known to admiralty such as a judgment for maintenance and cure or a division of damages. The state court would have been as powerless to do this as to enforce his decision by a judgment against the vessel itself as the offending agent.

If by any change this Court should concede that the state court erred in applying the common law of Ohio to the case before it and it is necessary to try this case again we would like this Court to point out for the instruction of the court of Ohio whether it had jurisdiction to determine this controversy, and if it had, in what other manner it could have determined it than the way in which it did.

If plaintiff in error will admit the fact that the state court had jurisdiction to hear the controversy, which it had submitted to it without protest, then it must, to justify its presence here, also assert that the state court would at once become vested with the authority of a court of admiralty and should administer the admiralty law in the manner and under the rules peculiar to the courts of admiralty.

We have dwelt on these things for the reason that in whatever direction an attempt is made to follow the ar-argument of plaintiff in error it ends in an absurdity.

There is still one other argument of plaintiff in error to which we might give passing notice. It is argued that the contract of employment, or shipping articles, fixes the rights and duties of parties in an action in tort. As it has always been such a fundamental proposition of the law that liability for negligence arises from the law of the place where the injury occurred, and cannot be altered by contract, we think discussion unnecessary in this Court. We feel that an employer cannot excuse itself from the consequences of its negligent acts by a contract in whatever form it is drawn, even though

the contract of employment takes the form of shipping articles.

Since this action arose this question has become largely academic save as it affects this crippled boy. *Congress has acted in this matter in the La Follette shipping bill which provides in section 20 that IN ANY SUIT TO RECOVER DAMAGES FOR ANY INJURY SUSTAINED ON BOARD A VESSEL OR IN ITS SERVICE, SEAMEN HAVING COMMAND SHALL NOT BE HELD TO BE FELLOW SERVANTS WITH THOSE UNDER THEIR AUTHORITY.* This was practically the law the court applied to this case. It may be argued that Congress did not go so far as to state in this act that a seaman might have a right against the owner of a vessel for his injuries negligently received, but the only inference to be drawn from the language used is that Congress assumed that under the law a seaman had such a right, and took away from the vessel owner the rule of fellow servant as applied to a superior officer.

The old rule stated in the Osceola case that all seamen on a vessel with the possible exception of the captain were considered fellow servants survived a time when the crews of vessels started as joint adventurers on trading enterprises. This relationship of the crew to its officers has long since passed away. There could be no greater travesty than to hold in our modern commercial age that a seaman is a fellow servant of a captain. If there ever was an employment in which the servant was absolutely subject to the orders and judgments of his superior officer it would be on board a vessel. On land a workman is free to quit his employment where the owner or his representative created needless hazards. On a vessel this option is denied him.

The plaintiff in error in asking this Court to write into the law of our modern world that a seaman is the fellow servant of his captain and therefore without redress for the negligence of the captain, and that the states of the Union have no right to enact statutes which would affect such a rule is asking this court to overlook the moving events of a century, and hold that the admiralty law is not a progressive science or suited to modern conditions.

The plaintiff had a right to a common law remedy. He asserted his right in a proper manner and before the proper tribunal. This common law tribunal acting under the principles of the common law was entirely competent to give him a remedy. The only difficulty in this case is the vexatious expense and delay to which plaintiff in error has subjected the crippled boy. The rules of this Court provide a penalty where this object becomes apparent. We submit that the circumstances of this case would warrant the rule's application.

Respectfully submitted,

REED & EICHELBERGER,
GEORGE H. EICHELBERGER,
Attorneys for Defendants in Error.

FILED
DEC 11 1916
JAMES D. MAHER
CLERK

In the Supreme Court of the United States

THE VALLEY STEAMSHIP COMPANY,
Plaintiff in Error.
vs.
JOSEPH MRAZ,
Defendant in Error.

No. 470
OCTOBER TERM,
1916

MOTION.

The Valley Steamship Company, Plaintiff in Error in the above entitled case, respectfully represents that the said case arose out of the same occurrence as the case of The Valley Steamship Company, Plaintiff in Error, against John J. Wattawa, Defendant in Error, No. 988, October Term, 1915, pending in this Court, in both of which writ of error has been allowed to the Court of Appeals of Ohio for the Eighth District; and that the said two cases involve the same state of facts and identical questions of law, and were consolidated and heard and decided together and a single opinion rendered therein, by the said Court of Appeals.

Said The Valley Steamship Company accordingly prays that printing of the record in this case may be dispensed with, and this case heard and decided on the printed record in the said case of The Valley Steamship Company against John J. Wattawa, and that the same disposition may be made and order and judgment entered herein as in said case; and said The Valley Steamship Company submits as part of this motion, the copy of letter hereto attached, received from the attorneys of the

said Defendant in Error regarding the subject of this motion.

THE VALLEY STEAMSHIP COMPANY,

By FRANK S. MASTEN,

Its Attorney.

I hereby acknowledge service of the foregoing motion by copy thereof, and that a true copy of my letter is thereto attached.

GEO. H. EICHELBERGER,

Attorney for Defendant in Error.

June 2, 1916.

MESSRS. HOLDING, MASTEN, DUNCAN & LECKIE,
Rockefeller Bldg.,
Cleveland.

Gentlemen: Attention Mr. Duncan

In re Wattawa vs. Valley Steamship Co.
and *Mraz vs. Valley Steamship Co.*

In regard to your recent question as to whether we will waive printing the record in the Mraz case in the Supreme Court of the United States, the questions raised in the record being identical with those raised in the Wattawa case, and that record being already printed, we beg to say that we do not care to make any formal waiver in this matter as we do not feel that you are properly in the Court in the Wattawa case and of course take the same position in the Mraz case. However, we shall not, in the event you desire to make a motion in the Supreme Court to dispense with printing this record, raise any objection whatever to said motion being granted, as we feel that the printing of such a record would be but a duplication of the expense already incurred and would not bring any new questions to the attention of the Court.

Yours very truly,

REED, EICHELBERGER & NORD.

VALLEY STEAMSHIP COMPANY *v.* WATTAWA.

VALLEY STEAMSHIP COMPANY *v.* MRAZ.

ERROR TO THE COURT OF APPEALS, EIGHTH DISTRICT, OF THE STATE OF OHIO.

Nos. 469, 470. Argued January 10, 11, 1917.—Decided May 21, 1917.

It being settled that in the absence of congressional legislation the commerce clause does not forbid a State to legislate concerning the relative rights and duties of employers and employees within her borders although engaged in interstate commerce, a contention to the con-

trary will not afford jurisdiction to this court to review a state judgment.

So *held* where an Ohio elective Workmen's Compensation Law, in withdrawing the defenses of contributory negligence, negligence of fellow servant and assumption of risk from employers not accepting provisions of the act, was claimed to contravene the commerce clause, as applied to a company engaged in interstate transportation by steamship.

The objection that the Ohio Compensation Act, as applied to a steamship company engaged in interstate commerce, would be an unconstitutional invasion of the federal maritime jurisdiction cannot be considered in this case, since the jurisdiction of the court below is confined to review of the trial court's judgment for errors appearing on the record, and this objection was neither made in the trial court, nor, clearly, in the petition in error before the court below, nor definitely mentioned in the latter court's opinion. *Mutual Life Insurance Co.* v. *McGrew*, 188 U. S. 291.

Dismissed.

THE cases are stated in the opinion.

Mr. Tracy H. Duncan, with whom *Mr. Frank S. Masten* was on the brief, for plaintiff in error.

Mr. George H. Eichelberger for defendants in error.

Memorandum opinion by MR. JUSTICE MCREYNOLDS.

NUMBER 469.

Seeking damages under the laws of Ohio, defendant in error Wattawa brought this action in the Common Pleas Court of Cuyahoga County. He alleged that by reason of the Steamship Company's negligence he suffered personal injuries in September, 1913 while employed by it as a deck hand on the Edwin N. Ohl then lying at Sandusky, Ohio; and that although an employer of more than five men the company was not a subscriber or contributor to the State Insurance Fund provided for by the Act of May 31, 1911—the first Ohio Workmen's Compensation Act.[1] In defence

[1] General Code, §§ 1465-37 to 1465-70.

the company claimed that although employing more than five men it was engaged in interstate commerce and therefore was not required to subscribe to the State Insurance Fund; denied negligence; and alleged that the accident resulted wholly from the employee's want of care and moreover that he had assumed the risk. Upon motion the allegation as to assumption of risk was stricken out.

The court charged that as the company had not accepted the Compensation Act it could not rely upon common-law defences based on the fellow-servant rule, assumption of risk or contributory negligence. Judgment upon a verdict for $5,200.00 was affirmed by the Court of Appeals, and petitions in error and for certiorari were denied by the Supreme Court.

We are asked to reverse the action of the Court of Appeals upon two grounds. First, because the company was engaged in interstate commerce and therefore could not be subjected to the Compensation Act without burdening such commerce contrary to the Commerce Clause of the Federal Constitution. Second, because Article III, § 2 of the Constitution extended judicial power to all cases of admiralty and maritime jurisdiction and thereby rendered the general maritime law part of the federal laws not subject to alteration by state statutes.

The first point relied upon is entirely without merit and inadequate to support our jurisdiction. In the absence of congressional legislation the settled general rule is that without violating the Commerce Clause the States may legislate concerning relative rights and duties of employers and employees while within their borders although engaged in interstate commerce. *Lake Shore & Michigan Southern Ry. Co.* v. *Ohio*, 173 U. S. 285, 297; *The Minnesota Rate Cases*, 230 U. S. 352, 408.

The second reason for reversal now set up was not presented to the trial court in any form. It was not pointed out clearly, if at all, by the petition in error before

the Court of Appeals and was not definitely mentioned in the opinion of that court whose powers only extend to a review of the trial court's judgment for errors appearing on the record. Section 12,247, Ohio General Code, as amended by Ohio Laws 103, pp. 405, 431. The question therefore is not properly before us. *Mutual Life Insurance Co.* v. *McGrew*, 188 U. S. 291, 308, 309.

The writ of error must be dismissed for want of jurisdiction.

NUMBER 470.

Counsel for the Steamship Company have admitted of record here that this cause involves the same state of facts and questions of law as those presented in Number 469. They were heard together and the same judgment will be entered in each of them.

Dismissed.